

1947

# The Conflict of Laws: A Comparative Study. Volume Two. Foreign Corporations: Torts: Contracts in General

Ernst Rabel

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*MICHIGAN LEGAL STUDIES*

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THE CONFLICT OF LAWS

*A Comparative Study*

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW SCHOOL (WHICH, HOWEVER, ASSUMES NO RESPONSIBILITY FOR THE VIEWS EXPRESSED) WITH THE AID OF FUNDS DERIVED FROM GIFTS TO THE UNIVERSITY OF MICHIGAN BY WILLIAM W. COOK.

*MICHIGAN LEGAL STUDIES*

*Hessel E. Yntema, Editor*

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DISCOVERY BEFORE TRIAL

George Ragland, Jr.

TORTS IN THE CONFLICT OF LAWS

Moffatt Hancock

THE AMENDING OF THE FEDERAL CONSTITUTION

Lester B. Orfield

REVIEW OF ADMINISTRATIVE ACTS

Armin Uhler

THE PREVENTION OF REPEATED CRIME

John Barker Waite

THE CONFLICT OF LAWS: A COMPARATIVE STUDY

Volumes One and Two

Ernst Rabel

UNREPORTED OPINIONS OF THE SUPREME COURT OF

MICHIGAN 1836-1843

William Wirt Blume, *Editor*

PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE

Lewis M. Simes and Paul E. Basye

# THE CONFLICT OF LAWS

*A Comparative Study*

by

ERNST RABEL

---

VOLUME TWO

Foreign Corporations: Torts: Contracts in General

Ann Arbor

UNIVERSITY OF MICHIGAN LAW SCHOOL

---

Chicago

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1947



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The author feels much indebted for kind and valuable information respecting foreign corporations that he received from Professor Laylin K. James of Ann Arbor and Messrs. Thomas G. Long, Attorney, and Vice-President Theodore Sirene of the Corporation Trust Company, both of Detroit. Professor Moffatt Hancock, then in Toronto, obligingly read the manuscript of the part "Torts" and has enriched it by various suggestions.

The volume speaks in general as of December, 1945, when the manuscript was completed; the delay that has occurred in publication, however, has enabled the author to include various references to later materials. The editor is under special obligation to Professor Hobart Coffey for patient assistance in revising the text, as well as to Mr. John H. Hoffman and Mrs. Dorothy D. Bray, respectively, for the care taken in verifying citations and in the detailed preparation of the manuscript.

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# List of Abbreviations

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Abh.	Abhandlungen.
A.C.	Appeal Cases, English Law Reports.
Adl. Clem.	Sammlung von Entscheidungen zum Handelsgesetzbuch, zusammengestellt von Adler und Clemens, fortgesetzt von Friedländer (Austria).
AG.	Amtsgericht (Germany).
Ala.	Alabama Reports.
Ala. App.	Alabama Appeals Reports.
Allen	Allen, Massachusetts Supreme Court Reports, vols. 83-96.
All E.R.	All England Law Reports, Annotated.
Allg. BGB.	Allgemeines Bürgerliches Gesetzbuch (Austria).
Allg. HGB.	Allgemeines Handelsgesetzbuch (Austria).
A.L.R.	American Law Reports, Annotated.
Am. Dec.	American Decisions (Select Cases).
Am. Bar. Asso.	American Bar Association Journal.
Jour.	
Am. J. Int. Law	American Journal of International Law.
Am. J. Int. Law, Supp.	American Journal of International Law, Supplement.
Am. Jur.	American Jurisprudence. A Comprehensive Text Statement of American Case Law, as Developed in the Cases and Annotations in the Annotated Reports System, Being a Rewriting of <i>Ruling Case Law</i> to Reflect the Modern Developments of the Law. San Francisco-New York, 1936.
Am. Marit. Cas.	American Maritime Cases.
Am. Rep.	American Reports.
Amtl. S.	Entscheidungen des k.k. Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen veröffentlicht von diesem Gerichtshofe, Fortsetzung der von Nowak begründeten Sammlung (Austria).

Annales de Droit Commercial	Annales de droit commercial et industriel français, étranger et international, fondées par M.E. Thaller, Paris, 1887.
Ann. Cas.	American Annotated Cases.
Annuaire	Annuaire de l'Institut de droit international.
Annual Digest	Annual Digest of Public International Law Cases, London.
Annuario Dir. Comp.	Annuario di diritto comparato e di studi legis- lativi.
App.	Corti d'appello (Italy), Cour d'appel (France).
App. Cas.	Appeal Cases, English Law Reports, 1876- 1890.
App. Civ.	Appelação civil (Brazil).
App. D.C.	Appeal Cases, District of Columbia.
App. Div.	New York Supreme Court, Appellate Divi- sion Reports.
Arch. Civ. Prax.	Archiv für die civilistische Praxis (Germany).
Arch. Jud.	Archivo Judiciario (Brazil).
Ariz.	Arizona Reports.
Ark.	Arkansas Reports.
Atl.	Atlantic Reporter (National Reporter Sys- tem, United States).
Atl. (2d)	Atlantic Reporter, National Reporter System, Second Series.
Barb. S.C.	Barbour's Supreme Court Reports, New York, 67 vols.
Barn. & Al.	Barnewall & Alderson, English King's Bench Reports.
Barn. & C.	Barnewall and Cresswell, English King's Bench Reports.
Bay. ObLG.	Bayerisches Oberstes Landesgericht.
Bay. ObLGZ.	Sammlung von Entscheidungen des Bayer- ischen Obersten Landesgerichts in Zivil- sachen.
BBl.	Bundesblatt der Schweizerischen Eidgenossen- schaft.
B.C.	British Columbia Reports.
Beav.	Beavan, English Rolls Court Reports.

Belg. Jud.	Belgique judiciaire. Gazette des tribunaux belges et étrangers.
Bell C.C.	Bell, English Crown Cases Reserved.
BG.	Bundesgericht (Switzerland).
BGB.	Bürgerliches Gesetzbuch (Germany).
BGE.	Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung.
Bing.	Bingham, English Common Pleas Reports.
Bing. N.C.	Bingham, New Cases, English Common Pleas.
B.J.	Boletín judicial (Dominican Republic).
Bl. f. Zürch. Rspr.	Blätter für zürcherische Rechtsprechung.
Bli. N.S.	Bligh, English House of Lords Reports, New Series, 11 vols.
Bl. IPR.	Blätter für Internationales Privatrecht, Beilage der Leipziger Zeitschrift für Deutsches Recht.
Bolze	Die Praxis des Reichsgerichts. Herausgegeben von Bolze (Germany).
Bost. U. L. Rev.	Boston University Law Review.
Brit. Year Book Int. Law	British Year Book of International Law.
Brown Ch. C.	Brown's Chancery Cases (England).
Brown Parl. Cas.	Brown's Cases in Parliament (England), 8 vols.
Bull. Inst. Belge	Institut belge de droit comparé, Bulletin trimestriel. (See also Revue Inst. Belge.)
Bull. Inst. Int.	Bulletin de l'Institut juridique international, Leyde. Originally: Bulletin de l'Institut intermédiaire international.
Bull. Soc. d'Études Lég.	Bulletin de la Société d'études législatives (France).
Bull. Soc. Législ. Comp.	Bulletin de la Société de législation comparée (France).
Burr.	Burrow, English King's Bench Reports.
BW.	Burgerlijk Wetboek (the Netherlands).
C.A.	Court of Appeals.
Cal.	California Reports.
Cal. App.	California Appeals Reports.
Cal. Dec.	California Decisions.

Cal. L. Rev.	California Law Review.
Cambr. L. J.	Cambridge Law Journal.
Cám. Com. de la Cap.	Cámara comercial de la capital (Argentina).
Cám. Fed. de la Cap.	Cámara federal de la capital (Argentina).
Can. Bar Rev.	Canadian Bar Review (Toronto).
Can. L.R.	Canada Law Reports, Exchequer Court and Supreme Court.
Can. Sup. Ct.	Canada Supreme Court Reports, 64 vols.
Cass.	Cassation, Cassazione.
C.B.	English Common Bench Reports (Manning, Granger & Scott).
C.B.N.S.	Common Bench Reports, New Series (Scott), 20 vols.
C.C.	Civil Code, Code Civil, Código Civil.
C. Civ. Proc.	Code of Civil Procedure.
C. Com.	Code de Commerce, Commercial Code, Código Commercial.
C.C.H.	Commerce Clearing House.
Ch.	Chancery Division, English Law Reports, 1891-
Ch.D.	Chancery Division, English Law Reports, 1876-1890.
China, Int. Priv. Law	Chinese Law of August 5, 1918, concerning the application of foreign law.
Cin. L. Rev.	Cincinnati Law Review.
C.J.	Corpus Juris (United States).
C.J.S.	Corpus Juris Secundum (United States).
Cl. and F.	Clark and Finnelly's Reports, House of Lords Cases.
C.L.T.	Canadian Law Times.
Clunet	Journal du droit international. Fondé par Clunet, continué par André-Prudhomme.
C. Marit.	Code Maritime (Bulgaria).
C. Obl.	Code of Obligations, Obligationenrecht (Switzerland) (See Swiss Code Obl.).
Col. L. Rev.	Columbia Law Review.
Colo.	Colorado Reports.

Com. Cas.	Commercial Cases (England).
Commw. L.R.	Commonwealth Law Reports (Australia).
Conn.	Connecticut Reports.
Consolidated Companies Act (Belgium)	Les lois sur les sociétés coordonnées (1935) (originally enacted May 18, 1873) inserted in the Code of Commerce as book 1, title ix.
Cornell L. Q.	Cornell Law Quarterly.
Cowp.	Cowper, English King's Bench Reports, 2 vols.
C. & P.	Carrington & Payne, English Nisi Prius Reports, 9 vols.
Cranch	Cranch, United States Supreme Court Reports, vols. 5-13.
Ct. Sess.	Scotch Court of Sessions Cases.
D.	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (France).
Dak.	Dakota Territory Reports.
D.C.	District of Columbia.
De G. & J.	De Gex & Jones, English Chancery Reports, 4 vols.
De G. M. & G.	De Gex, Macnaghten, & Gordon, English Chancery Reports, 8 vols.
Del.	Delaware Reports.
D.H.	Dalloz, Recueil hebdomadaire de jurisprudence (France).
Dig.	Digestas (Roman Law).
Disp. Prel.	Disposizioni Preliminari del Codice Civile (Italy).
DJZ.	Deutsche Juristenzeitung.
D.L.R.	Dominion Law Reports (Canada).
D. & R.	Dowling & Ryland, English King's Bench Reports.
Dt. Justiz	Deutsche Justiz. Amtliches Blatt der deutschen Rechtspflege, 1933-.
E. & B.	Ellis & Blackburn, Queen's Bench Reports, 8 vols.
Edw. Ch.	Edwards, New York Chancery Reports, 4 vols.

EG. BGB.	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany).
Eng. and Emp. Dig.	The English and Empire Digest.
Eng. Re.	English Reports (full reprint).
Eng. Rep.	Moak, English Reports (American reprint).
Entsch. kgl. Ob. Trib.	Entscheidungen des königlichen geheimen Obergerichtes, 1837-1879 (Prussia).
Exch.	Exchequer Reports (Welsby, Hurlstone & Gordon) 11 vols.
Ex. C. R.	Exchequer Court Reports (Canada).
Ex. D.	English Law Reports, Exchequer Division.
F.	Fraser, Scotch Sessions Cases, 5th Series.
F. (2d)	Federal Reporter, Second Series (United States).
Fallos	Fallos de la Suprema Corte de Justicia Nacional con la relación de sus respectivas causas. Publicación hecha por los doctores D. Antonio Tornassi y D. José Dominguez, Buenos Aires.
Fed.	Federal Reporter (United States).
Fed. Cas.	Federal Cases (United States).
Filangieri	Il Filangieri. Rivista giuridica dottrinale e pratica (Italy).
Fla.	Florida Reports.
Foro Ital.	Il Foro Italiano.
Foro Ital. Mass.	Il Massimario del Foro Italiano. Raccolta quindicinale delle massime delle sentenze della Cassazione Civile.
Foro Ital. Rep.	Il Foro Italiano, Repertorio.
F. Supp.	Federal Supplement (United States).
Ga.	Georgia Reports.
Ga. App.	Georgia Appeals Reports.
Gall.	Garrison, Reports, United States Circuit Courts.
Gaz. Pal.	Gazette du Palais (France).
Gaz. Trib.	Gazette des Tribunaux (France).
Geller's Zentralblatt	Zentralblatt für die Juristische Praxis, begründet von Dr. L. Geller (Austria). (See also Zentralblatt.)



Ges. m. b. H. Ges.	Gesetz über Gesellschaften mit beschränkter Haftung.
Giur. Comp. DIP.	Giurisprudenza comparata di diritto internazionale privato.
Giur. Comp. Dir. Civ.	Giurisprudenza comparata di diritto civile.
Giur. Ital.	Giurisprudenza italiana.
GIU.	Sammlung von zivilrechtlichen Entscheidungen des Obersten Gerichtshofes, begründet von Glaser und Unger (Austria).
GIU. NF.	<i>Idem</i> , Neue Folge (new series of the court reports cited above) (Austria).
Gray	Gray's Massachusetts Reports, vols. 67-82.
Grotius	Grotius, <i>Annuaire international</i> .
Grotius Soc.	Transactions of the Grotius Society.
Gruchot's Beiträge	Beiträge zur Erläuterung des deutschen Rechts, begründet von Dr. J. A. Gruchot.
Hans. GZ.	Hanseatische Gerichtszeitung. (See also Hans. RGZ. and Hans. RZ.)
Hans. RGZ.	Hanseatische Rechts- und Gerichts-Zeitschrift (Germany).
Hans. RZ.	Hanseatische Rechts-Zeitschrift.
Hardw.	Cases <i>temp.</i> Hardwicke, by Ridgway.
Harv. L. Rev.	Harvard Law Review.
Hbl.	Hauptblatt.
H. & C.	Hurlstone & Coltman, English Exchequer Reports, 4 vols.
HGB.	Handelsgesetzbuch (German Commercial Code).
Hill	Hill, Reports (New York).
H. L. Cas.	House of Lords Cases (Clark), 11 vols. (England).
Hof	Gerechtshof (the Netherlands).
How.	Howard, United States Supreme Court Reports.
How. Pr.	Howard, New York Practice Reports, 67 vols.
H.R.	Hooge Raad (the Netherlands).
Hy. Bl.	Henry Blackstone's Reports, Common Pleas (England).
Ida.	Idaho Reports.

Ill.	Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ill. L. Rev.	Illinois Law Review.
Ind.	Indiana Reports.
Ind. App.	Indiana Appellate Court Reports.
Indisch Tijdsch.	Indisch Tijdschrift von het Recht (Batavia).
Inst. Dr. Int.	Institut de droit international.
Int. Jahrb. Schieds- gerichtswesen	Internationales Jahrbuch für Schiedsgerichts- wesen in Zivil-und Handelssachen, heraus- gegeben von Dr. Arthur Nussbaum. Berlin, 1926--.
Int. Priv. Law	International Private Law.
Introd. Law	Introductory Law.
Iowa	Iowa Reports.
Iowa L. Rev.	Iowa Law Review.
IPRspr.	Die Deutsche Rechtsprechung auf dem Ge- biete des internationalen Privatrechts. Beil- age der Zeitschrift für ausländisches und internationales Privatrecht (Z. ausl. PR.).
Jahrb. DR.	Jahrbuch des Deutschen Rechts.
Jahrb. HE.	Jahrbuch höchstrichterlicher Entscheidungen (Austria).
Jahrb. KG.	Jahrbuch für Entscheidungen des Kammer- gerichts (Germany).
Japan C. Com. Ann.	The Commercial Code of Japan Annotated. Published by the Codes Translation Com- mittee, the League of Nations Association of Japan. Tokyo, 1931.
Japan, Int. Priv. Law	Japanese Law No. 10, of June 21, 1890, con- cerning the application of laws.
J. Bl.	Juristische Blätter (Austria).
Jherings Jahrb.	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (Germany).
Johns. Cas.	Johnson's New York Cases, 3 vols.
Journ. Comp. Leg.	Journal of Comparative Legislation and In- ternational Law. Formerly Journal of So- ciety of Comparative Legislation (Eng- land).
Journ. Soc.	Journal des sociétés civiles et commerciales (Librairie du Recueil Sirey, Paris).

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Jur. Arg.	Revista de Jurisprudencia Argentina (Buenos Aires).
Jur. Com. Brux.	Jurisprudence commerciale de Bruxelles.
Jurid. Rev.	Juridical Review (Scotland).
Jur. Liège	Jurisprudence de la cour d'appel de Liège.
Jur. Port Anvers	Jurisprudence du Port d'Anvers (Belgian Court Reports).
JW.	Juristische Wochenschrift (Germany).
Kan.	Kansas Reports.
K.B.	English Law Reports, King's Bench.
Kg.	Kantongerecht (the Netherlands).
KG.	Kammergericht (Germany).
Ky.	Kentucky Reports.
La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.
La. App.	Louisiana Courts of Appeal Reports.
La Ley	La Ley. Revista Jurídica Argentina.
La. L. Rev.	Louisiana Law Review.
L. of N. Treaty Series	League of Nations Treaty Series.
Law and Cont. Probl.	Law and Contemporary Problems, Duke University.
Law Q. Rev.	Law Quarterly Review (England).
L. C. J.	Lower Canada Jurist.
Ld. Raym.	Lord Raymond, English King's Bench Reports, 3 vols.
L. Ed.	Lawyer's Edition, United States Supreme Court Reports.
Leipz. Z.	Leipziger Zeitschrift für Deutsches Recht.
LG.	Landesgericht (Austria, Germany).
L. J. (Ch.)	Law Journal Reports, Chancery (England).
L.J. Exch.	Law Journal Reports, New Series, Exchequer, 1831- (England).
L.J.N.S.	The Law Journal, New Series, 1831- (London).
L.J. (P.C.)	Law Journal Reports, Privy Council (England).
Ll. L. Rep.	Lloyd's List Law Reports (England).
L.R.A.	Lawyers' Reports, Annotated (United States).

L.R.C.C.R.	English Law Reports Crown Cases Reserved, 1866-1875.
L.R. Ch.	English Law Reports, Chancery Appeal Cases, 1866-1875.
L.R.C.P.	English Law Reports, Common Pleas, 1866-1875, 10 vols.
L.R. Eq.	English Law Reports, Equity, 1866-1875, 20 vols.
L.R.P.C.	English Law Reports, Privy Council, Appeal Cases, 6 vols.
L.R.Q.B.	English Law Reports, Queen's Bench, 10 vols.
L.T.R.	Law Times Reports (England).
Man. R.	Manitoba Reports (Canada).
Maritime Code (Belgium)	Les lois de la navigation maritime et de la navigation intérieure of 1928, originally enacted August 21, 1879 (inserted in the Code of Commerce as book II, titles I-X).
Markenschutz und Wettbewerb	Monatsschrift für Marken-, Patent-, und Wettbewerbsrecht (Germany).
Martens, Recueil	Nouveau Recueil général des traités et autres actes relatifs aux rapports de droit international, publication de l'institut de droit public comparé et de droit de gens à Berlin. Continuation du grand Recueil de G. Fr. de Martens, founded 1817.
Mart. N.S. (La.)	Martin, Louisiana Reports, New Series, 1823-1830.
Mass.	Massachusetts Reports.
Md.	Maryland Reports.
Md. L. Rev.	Maryland Law Review.
Me.	Maine Reports.
Mich.	Michigan Reports.
Mich. L. Rev.	Michigan Law Review.
Minn.	Minnesota Reports.
Minn. L. Rev.	Minnesota Law Review.
Misc.	Miscellaneous Reports (New York).
Miss.	Mississippi Reports.
Miss. L.J.	Mississippi Law Journal.
Mitteilungen dt. Ges. Völker R.	Mitteilungen der deutschen Gesellschaft für Völkerrecht (Berlin).

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Mixed Arb. Trib.	Mixed Arbitral Tribunal.
Mo.	Missouri Reports.
Mo. App.	Missouri Appellate Reports.
Modern L. Rev.	The Modern Law Review (London).
Mo. L. Rev.	Missouri Law Review.
Monitore	Monitore dei Tribunali.
Mont.	Montana Reports.
Montreal L.R.S.C.	Montreal Law Reports, Superior Court (Canada).
Moo. P.C.	Moore, English Privy Council Reports.
Moo. P.C. Cas. (N.S.)	Moore's Privy Council Cases, New Series, 9 vols. (England).
M. & W.	Meeson & Welsby, English Exchequer Reports, 16 vols.
National Conference Handbook	Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (United States).
N.C.	North Carolina Reports.
N.E.	Northeastern Reporter (National Reporter System, United States).
N.E. (2d)	Northeastern Reporter (National Reporter System, United States) Second Series.
Neb.	Nebraska Reports.
Neb. L. Rev.	Nebraska Law Review.
N.F.	"Neue Folge" meaning new series, to indicate the beginning of new numbering in periodicals, collections of court reports etc. in the German language.
N.H.	New Hampshire Reports.
N.J.	Nederlandsche Jurisprudentie.
N.J. Law	New Jersey Law Reports.
N.J. Eq.	New Jersey Equity Reports.
N.J.L.J.	New Jersey Law Journal.
N.J. Misc.	New Jersey Miscellaneous Reports.
N.M.	New Mexico Reports.
Nouv. Revue	Nouvelle Revue de droit international privé.
N.S.	New series, if added to court reports, periodicals, etc.
N.S.R.	Nova Scotia Reports (Canada).

N.W.	Northwestern Reporter (National Reporter System, United States).
N.Y.	New York Court of Appeals Reports.
N.Y.L.J.	New York Law Journal.
N.Y. Misc.	New York Miscellaneous Reports.
N.Y. St. Rep.	New York State Reporter.
N.Y. Supp.	New York Supplement Reports (National Reporter System, United States).
N.Y. Supp. (2d)	New York Supplement Reports (National Reporter System, United States) Second Series.
Oberapp. Ger.	Oberappellationsgericht (Germany).
O Direito	O Direito. Revista Mensal de Legislação, Doutrina e Jurisprudencia (Brazil).
OGH.	Oberster Gerichtshof (Austria).
Okla.	Oklahoma Reports.
OLG.	Oberlandesgericht (Germany and Austria).
O.L.R.	Ontario Law Reports (Canada).
O.N.P.	Ohio Nisi Prius Reports.
O.R.	Ontario Reports (Canada).
Ore.	Oregon Reports.
O.W.N.	The Ontario Weekly Notes (Canada).
P.	English Law Reports, Probate Division.
Pa.	Pennsylvania Reports.
Pac.	Pacific Reporter (National Reporter System, United States).
Pac. (2d)	Pacific Reporter (National Reporter System, United States) Second Series.
Pa. D. & C.	Pennsylvania District and County Reports.
Paige	Paige, New York Chancery Reports.
Pand. Belges	Pandectes belges.
Pand. Pér.	Pandectes périodiques. Recueil de jurisprudence (Belgium).
Pasicrisie	Pasicrisie belge. Recueil général de la jurisprudence des cours et tribunaux de Belgique.
Pa. St.	Pennsylvania State Reports.
Pa. Super. Ct.	Pennsylvania Superior Court Reports.
P.D.	Probate Division, English Law Reports.
Peake Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795-1812 (England).

Pet. S.C.	Peter's United States Supreme Court Reports, vols. 26 to 41.
P.G.R.	Liechtensteinisches Zivilgesetzbuch, Personen- und Gesellschaftsrecht.
Phillips	Phillips, English Chancery Reports.
Poland, Interlocal Priv. Law	Polish Law of August 2, 1926, on Interlocal Private Law.
Poland, Int. Priv. Law	Polish Law of August 2, 1926, on International Private Law.
Praxis	Die Praxis des Bundesgerichts (Switzerland).
Preuss. Ges. Samml.	Preussische Gesetzsammlung.
Priv. Int. Law	Private International Law.
Q.B.	Queen's Bench, English Law Reports, 1891—.
Q.B.D.	English Law Reports, Queen's Bench Division, 1876—1890.
Que. K.B.	King's Bench Reports (Quebec, Canada).
Que. Q.B.	Queen's Bench Reports (Quebec, Canada).
Que. Pr.	Quebec Practice Reports (Canada).
Que. S.C.	Quebec Official Reports, Superior Court (Canada).
R.	Rettie, Crawford and Melville, (Fourth Series) Scotch Session Cases, 25 vols.
Rb.	Rechtbank (the Netherlands).
Recht	Das Recht, Übersicht über Schriftum und Rechtsprechung, begründet 1897 von Dr. Hs. W. Soergel, Berlin. (Since 1935 Beilage zu "Deutsche Justiz" Amtliches Blatt der deutschen Rechtspflege, Berlin.)
Rec. Somm.	Recueil des sommaires de la jurisprudence française.
Recueil	Recueil des cours de l'Académie de droit international de la Haye.
Recueil trib. arb. mixtes	Recueil des décisions des tribunaux arbitraux mixtes.
República Argentina, Segundo Congreso Sudamericano	Segundo Congreso Sudamericano de Derecho Internacional Privado, Montevideo 1939—40, ed. República Argentina, Ministerio de Relaciones Exteriores y Culto, Buenos Aires 1940.

Req.	Chambre des requêtes de la cour de cassation (France).
Rev. C. Obl.	Revised Code of Obligations, Revidiertes Obligationenrecht (Switzerland).
Rev. de Jur.	Revue de Jurisprudence (Quebec, Canada).
Rev. Der. Juris. Adm.	Revista de Derecho, Jurisprudencia y Administración (Uruguay).
Revista del Foro	La Revista del Foro. Organo del Colegio de Abogados (Peru).
Revista de los Trib.	Revista de los Tribunales (Peru).
Revista Der. Jur. y Ciencias Soc.	Revista de Derecho, Jurisprudencia y Ciencias Sociales (Chile).
Revista Der. Priv.	Revista de Derecho Privado (Spain).
Revista Dir.	Revista de Direito Civil, Commercial e Criminal (Brazil).
Revista Dir. Com.	Revista de Direito Comercial (Brazil).
Revista Gen. Legisl. y Jur.	Revista General de Legislación y Jurisprudencia (Spain).
Revista Jur.	Revista Jurídica. Doutrina-Jurisprudencia-Legislação (Brazil).
Revista Sup. Trib.	Revista do Supremo Tribunal (Brazil).
Rev. Jur. Bras.	Revista de Jurisprudencia Brasileira (Brazil).
Rev. Trim. D. Civ.	Revue trimestrielle de droit civil (France).
Revue	Revue de droit international privé. Fondée par A. Darras.
Revue Crit.	Revue critique de droit international.
Revue Dor	Revue de droit maritime comparé, fondée par Leopold Dor. Paris, 1923.
Revue Dr. Int. (Bruxelles)	Revue de droit international et de législation comparée. Fondée par Rolin Jaquemyns, Asser et Westlake.
Revue Inst. Belge	Institut Belge de droit comparé, Revue trimestrielle (1924- ). Originally: Revue de l'Institut de droit comparé (1908-1914). Suspended 1915-1921. 1922-1924: Institut Belge de droit comparé, Bulletin trimestriel (See Bull. Inst. Belge).
Revue Int. Dr. Marit.	Revue internationale du droit maritime, Paris, 1885-1922.



RG.	Reichsgericht (Germany).
RGBl.	Reichsgesetzblatt (Germany).
RGZ.	Entscheidungen des Reichsgerichts in Zivilsachen (Germany).
Rhein. Arch.	Rheinisches Archiv für Zivil- und Strafrecht.
Rheinische Z. f. Zivil- und Prozessrecht	Rheinische Zeitschrift für Zivil- und Prozessrecht des In- und Auslandes, 1908-1925.
R.I.	Rhode Island Reports.
Riv. Dir. Com.	Rivista del diritto commerciale, Milano, 1903-
Rivista	Rivista di diritto internazionale.
Rivista Dir. Int. di Napoli	Rivista di diritto internazionale e di legislazione comparata.
Rivista Dir. Priv.	Rivista di diritto privato.
Rivista Italiana	Rivista italiana di diritto internazionale privato e processuale.
R.L.	Revue légale (Canada).
ROHG.	Reichsoberhandelsgericht (Germany).
ROHGE.	Entscheidungen des Reichsoberhandelsgerichtes (Germany).
ROLG.	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts (Germany).
R.R.	Revised Reports (England).
Rspr.	Die Rechtsprechung. Herausgegeben vom Verband österreichischer Banken und Bankiers; redigiert von Bergel, Löbel und Wahle (Vienna).
Rv.	Wetboek van Burgerlijke Regtsoverdracht (the Netherlands).
Ry. & M.	Ryan & Moody, English Nisi Prius Reports (England).
S.	Sirey, Recueil général des lois et des arrêts (France).
Sächs. Arch.	Sächsisches Archiv für Rechtspflege.
S.A.L.R. App. D.	South African Law Reports, Appellate Division.
S.A.L.R. Transvaal Prov. Div.	South African Law Reports, Transvaal Provincial Division.

S.C.	South Carolina Reports; Sessions Cases (Scotch); Supreme Court Reporter (United States).
S.C. (H.L.)	Court of Session Cases, House of Lords (Scotland).
Schweiz. Verein. f. Int. R.	Schweizerische Vereinigung für Internationales Recht.
Scot. L.R.	Scottish Law Reporter.
Scot. L. Rev.	Scottish Law Review.
S.C.R.	Supreme Court Reports (Canada).
S. Ct.	Supreme Court Reporter (National Reporter System, United States); Supreme Court; Suprema Corte.
S.E.	Southeastern Reporter (National Reporter System, United States).
Seman. Jud.	Semanario Judicial de la Federación. Sentencias dictadas por la Suprema Corte (Mexico).
Seuff. Arch.	J. A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten.
Sem. Jud.	La Semaine judiciaire (Switzerland).
Sett. Cass.	Settimana della Cassazione (Italy).
SJZ.	Schweizerische Juristen Zeitung.
So.	Southern Reporter (National Reporter System, United States).
Sol. J.	Solicitor's Journal (London).
SpR.	Spruchrepertorium des Obersten Gerichtshofes (Austria).
S.R.	Liechtensteinisches Zivilgesetzbuch, Sachenrecht.
Strange	Strange's Reports, English King's Bench, 2 vols.
St. R. & O.	Statutory Rules and Orders (Great Britain).
Sup. Trib. Fed.	Supremo Tribunal Federal (Brazil).
S.W.	Southwestern Reporter (National Reporter System, United States).
S.W. (2d)	Southwestern Reporter (National Reporter System, United States) Second Series.

Swab.	Swabey, English Admiralty Reports.
Swan.	Swanston, English Chancery Reports, 3 vols.
Swiss Code Obl.	Das Obligationenrecht, Bundesgesetz betreffend die Ergänzung des schweizerischen Zivilgesetzbuches. March 30, 1911.
SZ.	Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen. Veröffentlicht von seinen Mitgliedern (Austria).
Tenn.	Tennessee Reports.
Tenn. App.	Tennessee Civil Appeals Reports.
Tenn. L. Rev.	Tennessee Law Review.
Terr. L. R.	North-West Territories Law Reports (Canada).
Tex.	Texas Reports.
Tex. Civ. App.	Texas Civil Appeals Reports.
Tex. L. Rev.	Texas Law Review.
Themis	Θέμις (Themis) Weekly Law Journal, Athens, 1890-.
T.L.R.	Times Law Reports (England).
T.R.	Term Reports (Durnford & East) (England).
T. & R.	Turner & Russell, English Chancery Reports.
Trib. civ.	Tribunal civil (France).
Trib. com.	Tribunal de commerce (France).
Trib. corr.	Tribunal correctionnel (France).
Trib. Marit.	Tribunal maritime, Maritime Tribunal.
Trib. paix	Tribunal de paix (France).
Trib. Supr.	Tribunal Supremo.
Tul. L. Rev.	Tulane Law Review.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.Q.B.	Upper Canada Queen's Bench Reports.
U.L.A.	Uniform Laws, Annotated (United States).
U. of Chi. L. Rev.	University of Chicago Law Review.
U. of Detroit L. J.	University of Detroit Law Journal.
U. of Pa. L. Rev.	University of Pennsylvania Law Review and American Law Register.
U. of Toronto L. J.	University of Toronto Law Journal.

U.S.	United States Reports.
U.S.C.	Code of the Laws of the United States of America.
U.S.C.A.	Code of the Laws of the United States of America, Annotated.
U.S.C.C.A.	United States Circuit Courts of Appeals Reports.
Utah	Utah Reports.
Va.	Virginia Reports.
Va. L. Rev.	Virginia Law Review.
Vt.	Vermont Reports.
W.	Weekblad van het Recht (the Netherlands).
Wall.	Wallace, United States Supreme Court Reports, vols. 68-90.
Warn. Rspr.	Die Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts, herausgegeben von O. Warneyer (Germany).
Wash.	Washington State Reports.
Wash. & Lee. L. Rev.	Washington and Lee Law Review.
Wash. L. Rev.	Washington Law Review.
W. Bl.	Sir William Blackstone, English King's Bench Reports.
Wheat.	Wheaton, United States Supreme Court Reports, vols. 14-25.
Wis.	Wisconsin Reports.
W.L.R.	Western Law Reporter (Canada).
Wis. L. Rev.	Wisconsin Law Review.
W.N.	English Law Reports, Weekly Notes.
W.Va.	West Virginia Reports.
Woods	Woods, United States Circuit Court Reports, 4 vols.
W. Va. L. Q.	West Virginia Law Quarterly.
W.W.R.	Western Weekly Reports (Canada).
Yale L. J.	Yale Law Journal.
Zab.	Zabriskie, New Jersey Law Reports, vols. 21-24.
Z. AK. deutsches R.	Zeitschrift der Akademie für deutsches Recht.

Z. ausl. öff. R.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. Berlin und Leipzig 1929-.
Z. ausl. PR.	Zeitschrift für ausländisches und internationales Privatrecht. Founded by Ernst Rabel.
ZBG.	Schweizerisches Zivilgesetzbuch (Swiss Civil Code).
ZBJV.	Zeitschrift des Bernischen Juristenvereins (Switzerland).
Zentralblatt	Zentralblatt für die Juristische Praxis. Continuation of Geller's Zentralblatt (Austria).
Z. f. Ostrecht	Zeitschrift für Ostrecht. (See also Z.osteurop. R.).
Z. f. Völkerrecht	Zeitschrift für Völkerrecht, Breslau, 1907-.
Z. Handelsr.	Zeitschrift für das gesamte Handelsrecht und Konkursrecht, Stuttgart.
Z. int. R.	Niemeyer's Zeitschrift für internationales Recht.
Z. osteurop. R.	Zeitschrift für osteuropäisches Recht. (In 1927 merged with Ostrecht into Zeitschrift für Ostrecht. Continued since 1934 as Zeitschrift für osteuropäisches Recht. See also Z.f.Ostrecht).
ZPO.	Zivilprozessordnung (Code of Civil Procedure of Germany and Austria).
Z. Schweiz. R.	Zeitschrift für schweizerisches Recht.

## PART SIX

### CORPORATIONS AND KINDRED ORGANIZATIONS

In this part, with respect to Latin America, short citations will be used for the following articles, all published in the *Tulane Law Review*:

Grant, Schuster and Harold Smith, "Legal Problems Affecting American Corporations Abroad: A Symposium," in 8 *Tul. L. Rev.* (1934) 550.

Voelkel, "A Comparative Study of the Laws of Latin America Governing Foreign Business Corporations," 14 *id.* (1940) 42.

A series of articles on "The Judicial Status of Non-Registered Foreign Corporations," regarding the laws of Chile, Argentina and Uruguay by Rives in 6 *Tul. L. Rev.* (1932) 558; Brazil by Knight in 7 *id.* (1933) 210; Mexico by Schuster in 7 *id.* (1933) 341; Colombia by Rives in 8 *id.* (1934) 542; Ecuador by Greaves in 9 *id.* (1935) 409; Nicaragua by Eder in 10 *id.* (1935) 58; Guatemala by Schuster in 12 *id.* (1937) 74; Panama by Eder in 15 *id.* (1941) 521; Venezuela by Crawford in 12 *id.* (1938) 218 and by Goldstone in 17 *id.* (1943) 575.

## CHAPTER 18

### Types of Organizations, Nationality, and Domicil

THE essential incidents of the activities of any legal entity are controlled by one municipal law, a single ubiquitous personal law, parallel to the statute personal of individuals. This is recognized in the legislation of all countries in the world, despite a contrary theory propounded by Pillet<sup>1</sup> which has created much doctrinal confusion, and despite a useless theoretical dispute whether a corporate entity is susceptible of "status" or of "capacity." Even the American conflicts law, which has tended to reduce the sphere of the law of domicil as governing the status of individuals, gives broad effect to the law of the state in which a corporation has been created.

This law governs existence, capacity, internal structure, external legal relations, modifications of the charter and dissolution of the legal entity. The importance of this principle cannot be overemphasized.

In the United States this conception is essentially, though not to its full extent, implemented by the Full Faith and Credit Clause of the Federal Constitution. Thus, state courts have been required to follow the constitution, laws, and judicial decisions of the corporation's home state in order to determine such questions as that of stockholders' liability.<sup>2</sup>

<sup>1</sup> PILLET, *Personnes Morales* 46 §§ 34ff.

<sup>2</sup> *Converse v. Hamilton* (1912) 224 U. S. 243; *Selig v. Hamilton* (1914) 234 U. S. 652. CORWIN, "The Full Faith and Credit Clause," 81 U. of Pa. L. Rev. (1933) 371, 386 *ad n.* 65, classifies this case into the formula of Mr. Justice Holmes, that relationships ought to be governed by the law under which they were formed. But this idea does not explain why the law of the corporation and not that of the stockholder governs.



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But the criterion determining this personal law may take either of two forms. While, in common law countries and a few others, the law of the state of incorporation controls, in most civil law countries a corporate entity is subject to the law of the state in which it has its permanent central office of management (headquarters, domicile, "seat").<sup>3</sup>

The details of this contrast will be discussed later. At this place we consider, with the help of elementary comparative observations respecting the municipal laws, what organizations are potentially susceptible of having a personal law.

### I. CATEGORIES OF ORGANIZATIONS

#### 1. Survey

The Restatement,<sup>4</sup> in an elaborate chapter on "corporations," declares "incorporation" to be the process by which official representation is substituted for individual action in causing liability of members, whether limited or unlimited and whether in contract or tort.<sup>5</sup> This description has its origin in the theory that a corporation is nothing else than the members acting in their capacity as a corporate body.<sup>6</sup> Whatever the merits of this theory may be (and it may have some virtue as an antidote for the noxious fiction theory likewise adopted in the Restatement), representation will not serve as an exclusive mark of incorporation because, on the one hand, partners also may be represented by administrators, possibly widely empowered, and, on the other hand, a membership corporation may reserve all important decisions to the general meeting of the members.

<sup>3</sup> In English, the expression "seat" has been repeatedly used to translate the French *siège social*, German *Geschäftssitz*, and officially in the English text of Pan-American documents, particularly so in the Presidential Proclamation of August 21, 1941, 55 Stat. 1201, 1204, on the juridical personality of foreign companies.

<sup>4</sup> As in the first volume, "Restatement" means the Restatement of the Law of Conflict of Laws (1934).

<sup>5</sup> Restatement § 152 comment c.

<sup>6</sup> Restatement § 152 comment a.

Thus, the concept of "corporation" itself, which the Restatement fails to define, remains somewhat obscure. The Restatement does, however, make clear that the chapter on corporations is limited exclusively to incorporated "associations of individuals." Hence, the rules therein adduced do not apply to foreign states, to what are called in this country municipal corporations, nor to civil law foundations. In modern theory, the state recognized as a legal person is an institution, not a mere association of individuals. In fact, although "corporation" in American terminology may denote (1) any distinct legal entity, equivalent to "juristic person" in the conception of civil law, ordinarily, however, it seems either to indicate (2) private incorporated associations formed by persons, or to refer (3), still more narrowly, to associations incorporated for business purposes, this being the most common usage. The Restatement conceives of a corporation as "any association of individuals," adopting thereby the second meaning with the only difference that in speaking of individuals the possibility of corporations being members of a corporation is overlooked. In the further course of its development, however, without saying it, the Restatement gives attention almost exclusively to business corporations, which in itself is justified. The emphasis on these corporations corresponds with their prevalence in legal practice, and the gaps thus left uncovered by the Restatement are not difficult to fill.

More serious than the neglect of nonprofit corporations and the disregard of public corporations is the silence regarding all associations that are not corporations. The Restatement has simply provided a chapter on corporations and a chapter on "contracts." In the latter, it has set out a few rules merely purporting to fix the place of contracting in contracts concluded among partners (§ 342), or between partners and

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third parties (§§ 315, 318, 328-331), and a few rules in which the powers of partners to act for the partnership are identified with the authorization of any other agent (§§ 343-345). Apparently, the neat old contrast of company and partnership is responsible for this arrangement. The innumerable mixed forms of association that have developed in the last century are ignored. Moreover, the common assumption is perpetuated that a partnership can be adequately analyzed in terms of contractual relationship. But partnership, as it exists in England and the United States and in commercial use all over the world, is not a *societas*, as in ancient Rome (or in the German Civil Code), based on a contract as distinguished from an association and existent only in the person of the partners; it has entity aspects, a fact that requires recognition in conflicts law.

To find our way through these doubts, we may be permitted to adjust the usual American terminology to a broad classification of the organizations involved under the following scheme:

(a) Legal (or juristic, or moral) persons are entities having separate existence as subjects of rights and obligations in private law. They include:

(i) Public legal persons, such as the state itself, and the municipal and other public organizations created by the state as distinct persons, as well as certain other bodies.

(ii) Private incorporated associations (corporations in the second meaning *supra*), these being—

1. Business corporations,
2. Incorporated nonprofit associations,
3. Co-operative associations.

(iii) Private foundations, constituting independent units after the model *pia corpora* of the law of Justinian. Charitable corporations and charitable trusts may be put in this class.

(b) Unincorporated associations,<sup>7</sup> including—

(i) Nonincorporated nonprofit associations,

(ii) Limited partnerships, limited partnership associations, joint stock companies, and business trusts,

(iii) General partnerships.

(c) Contracts of joint undertaking, that is, contractual arrangements such as joint adventures (*societas unius rei*), contracts of joint tenancy, et cetera.

Whatever comparisons may be made in this field, the basic concept, valid for the legislation of every country and every purpose, must be and is that of legal personality. This is a very simple concept developed by the Roman jurists and adopted everywhere. The essential feature of a legal person is that it is a person other than an individual and *entirely* distinct from any individual. An incorporated *association* is “a legal person apart from its members,” a notion thoroughly familiar to American lawyers.<sup>8</sup> The complete independence of the corporate person as a subject of rights and duties in respect to third parties, and not any form of representation of the members, is the decisive factor. Incorporation is the process by which this legal person is brought into being; an organization is endowed with personality.

It seems opportune here to mention the most important types of business organizations in common use and, as we shall have to concentrate mostly on commercial organizations, to add a brief survey of the other legal persons.

## 2. Private Business Organizations

The prototype of all corporate bodies in the modern world of private business is the regular stock corporation with transferable shares, the liability of the members being limited to

<sup>7</sup> Terminology following § 1 par. XIV of the Model Business Corporation Act.

<sup>8</sup> STEVENS, Corporations, Ch. 1 § 1.

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their contribution to the capital and the members participating in the profits and surplus according to some fixed proportion. There are varied additional characteristics inherent in the different types of stock corporations, represented by the usual American shareholder corporation, the English public company, the French *société anonyme*, and the German *Aktiengesellschaft*, but the indicated elements are the features common to all.<sup>9</sup>

Akin to this fundamental type are French and German stock corporations with shares *en commandite*, that is, having at least one member with unlimited personal liability for the company's debts.

Furthermore, "private limited companies"<sup>10</sup> have sprung up in recent decades as younger brothers of the ordinary stock company. Based on capital stock quotas rather than on the personal liability of the members, these are definitely not partnerships in the ordinary sense. But restrictions on the transfer of shares and other measures to lessen the dangers to the public, make it possible for legislatures to reduce the onerous formalities and security requirements that regular stock corporations have to bear in Europe and Latin America. The model for all these minor forms of stock corporations has been the German *Gesellschaft mit beschränkter Haftung* (GmbH.), introduced in 1898 and since then adopted in almost all civil law countries with more or less modifications (*société à responsabilité limitée*, *sociedad a responsabilidad limitada*, et cetera). In England, a modified form of stock company, developed in the legal practice, has been authorized by the Companies Acts of 1913 and 1929.<sup>11</sup>

<sup>9</sup> G. HAMBURGER, 2 *Rechtsvergl. Handwörterbuch* 59 at 60, 126. Cf. also STREICHENBERGER, *Sociétés anonymes de France et d'Angleterre* (Lyon 1933)

31.

<sup>10</sup> SCHUSTER, *The German Commercial Code* (London 1911) 235.

<sup>11</sup> See WRIGHTINGTON, "Private Companies," 10 *Am. Bar Asso. Jour.* (1924) 475 who advocated a similar type for this country to unburden private business in restricted associations.

Where an organization did not satisfy all the conditions of incorporation, the traditional theory saw in it nothing but some kind of contractual arrangement. The Restatement, as indicated, conforms to this tradition. It was also adopted in the highly elaborate provisions of the German Civil Code, framed toward the end of the last century. These prescribed that associations not having obtained juristic personality should be treated under the rules on "society," the members of which, among other particulars, may not be changed and are liable for the debts (BGB. § 54, sent. 2). The German courts, however, were not long embarrassed by this awkward construction; through ingenious interpretations, they arrived at conclusions ascribing to various "unincorporated associations" almost every attribute of incorporated associations. This perhaps most outstanding example of law, judge-made against the express direction of the legislature, appeared indispensable for the many thousands of groups that otherwise would have operated in a dubious legal status. Parallel developments can be found in the adjudications of all the other countries, such as, for instance, the various types of the so-called *de facto* corporations.

There is a rich variety of instances in which corporate and partnership elements appear mixed in one combination or another. Many doubts and learned discussions have arisen concerning the two questions: (1) whether a mercantile partnership is an aggregate or a legal unit and (2), if this is denied as by the dominant theory of the common law or the German law, then nevertheless whether a partnership should not be assimilated to fully incorporated bodies in certain important respects or for certain purposes. There have been analogous disputes about the nature of business trusts, *de facto* corporations, and other organizations "hybrid in nature, savoring of both corporations and partnership."<sup>12</sup>

<sup>12</sup> Oklahoma Fullers Earth Co. v. Evans (1937) 179 Okla. 124, 125, 64 Pac. (2d) 899, 901.

Among the particular reasons for emphasizing the corporate elements of these mixed types, is the fact that on the existence of such entity aspects may depend a decision whether a personal law is to be ascribed to a business organization. Then too, significant conflicts problems are produced by the diversity of legal conceptions according to which parallel organizations are differently classified. For instance, mercantile partnerships are regarded as legal persons in the French doctrine, followed in Belgium, Italy, Spain, Portugal, Brazil, Mexico, and most other Latin countries, whereas Anglo-American, German, Swiss, Dutch, Argentine, and other courts prevailing regard partnerships under their respective laws as mere aggregates of individuals.

Modern theory has paved the way to do justice to every one of the many types of combined structure. If doctrinal prejudices are avoided, it will become possible to formulate the conflicts rule applicable to partially corporated bodies.<sup>13</sup>

It is significant that in the legal language of all civil law countries one finds a single comprehensive term to embrace corporations, partnerships, and all intervening types, such as French *sociétés*, Spanish *sociedades*, Italian *società*, German *Handelsgesellschaften*. In the documents of the Pan-American Union, *sociedad* is translated by *company*, a term recently much employed in England and in bilateral treaties in the same broad meaning. In this country, the term *business association* reflects the feeling, which appears universal at present, that all these types are functionally and analytically related.

### 3. Public Legal Persons

*States.* From Savigny's time, the generally accepted view has been that recognition given to a state according to the rules of public international law, implies recognition of its

<sup>13</sup> See *infra* pp. 100, 115, 116.

capacity in private law matters.<sup>14</sup> States thus enjoy full capacity without any special grant.<sup>15</sup> In particular, they may bring suits to the extent allowed to all foreigners in general and, in principle, may receive donations and legacies as well as immovables on the same basis. Their activities, however, like those of other foreign persons, may be restricted by the local law.<sup>16</sup> International law does not guarantee states more than a right to the usual buildings for diplomatic and consular representation.<sup>17</sup> All these propositions<sup>18</sup> were decided in the careful consideration of two cases: that of Zappa, a former Greek national, who appointed the Greek state heir to his immovables in Rumania and South Germany;<sup>19</sup> and that of the Countess de Plessis-Bellière, who left her estate in France to the Holy See.<sup>20</sup>

*Public corporations.* By further universal acceptance, recognition of a state extends *ipso jure* to all instruments of government exercising political powers of the state and endowed by it with separate legal personality, such as provinces or municipal corporations. The same is true with respect to charitable, educational, and religious corporations, performing public but nongovernmental functions and established by

<sup>14</sup> FOOTE 87; 1 FIORE § 303; WEISS, 2 *Traité* 390; MATOS § 119; on the Code of Chile, see 3 VICO §§ 40-42. In application to the United States, Story, J., in *U. S. v. Tingey* (1831) 5 Pet. S. C. 115; as to the states, Grier, J., in *Cotton v. U. S.* (1850) 11 How. 229.

<sup>15</sup> Código Bustamante, art. 32; Montevideo Treaty on Civil Law (1889) art. 3; Argentina: C. C. art. 34; 3 Vico § 71.

<sup>16</sup> 2 BAR 671; 2 WHARTON § 746  $\frac{1}{2}$ ; WESTLAKE § 192; Trib. Montdidier (Feb. 4, 1892) legacy to the Pope, see RENAULT, Clunet 1893, 1118; App. Colmar (Dec. 12, 1933) *Revue* 1935, 178.

<sup>17</sup> See below, p. 165 on the applicability of the French C. C. art. 910; p. 166 on the capacity to acquire immovables.

<sup>18</sup> German RG. (1913) 83 RGZ. 367; (1918) 92 RGZ. 76.

<sup>19</sup> Case Zappa (1892), see DESJARDINS, "Des droits en Roumanie d'un Etat étranger appelé par testament à recueillir la succession d'un de ses sujets," Clunet 1893, 1009; opinions by RENAULT, WOESTE, and LEJEUNE, Clunet 1893, 1118, and of the Faculty of Berlin, 3 *Z.int.R.* (1893) 275.

<sup>20</sup> Case of Plessis-Bellière (1890) App. Amiens (Feb. 21, 1893) Clunet 1893, 384; cf. DUBOIS, "La papauté devant le droit international public et privé," Clunet 1910, 374.



the state as legal entities in private law.<sup>21</sup> These latter "juristic persons of public law," which do not correspond with geographical segments of the country, are called in France "*établissements publics*,"<sup>22</sup> and in Germany "*öffentlichrechtliche Stiftungen*" or "*Anstalten*."<sup>23</sup>

It follows that the question whether legal personality is bestowed upon a governmental unit, is determined by the state to which it belongs, and by no means according to the *lex fori*.<sup>24</sup> Accordingly and by way of example, a state university not exclusively maintained by the state is not deemed to be a public corporation, if its own state denies it this nature.<sup>25</sup>

Exceptions to the *ipso jure* recognition of foreign public establishments seem, however, to be made in some Latin-American countries,<sup>26</sup> especially in the case of church institutions. Quite generally speaking, the *Código Bustamante* does not assure recognition for foreign administrative organisms (*corporaciones*) according to the law "that has created or recognized them,"<sup>27</sup> but leaves it to the pleasure of the "territorial law."<sup>28</sup>

<sup>21</sup> PILLET, *Personnes Morales* § 49. This does refer to chambers of commerce but not to the so-called foreign chambers of commerce, the first of which was in Yokohama in 1866, and the second the Belgo-American chamber in New York. The French Supreme Court, Cass. (req.) (Nov. 7, 1933) *Revue Crit.* 1935, 109 held a "foreign chamber" in Paris to be a private association.

Argentina: C. C. art. 34.

<sup>22</sup> See 7 *Répert.* 650 No. 2.

<sup>23</sup> NEUMEYER, 1 *Int. Verwaltungs R.* 140.

<sup>24</sup> 7 *Répert.* 650ff. No. 2.

<sup>25</sup> This is the doctrine of internal law developed in this country according to BALLANTINE, *Corporations* 46, 810.

<sup>26</sup> *Infra* p. 166 n. 198. Rules are missing in e.g., Venezuela, GOLDSTONE, 17 *Tul. L. Rev.* (1943) at 587. The *Código Bustamante*, arts. 31-33 grants unconditional recognition only to the states; Treaty of Montevideo on Civil Law (1889) art 3; Brazil, C.C. art. 20 refers to private juristic persons only; Savigny's antiquated theory of "persons of necessary existence" has complicated rather than facilitated the Latin-American doctrines.

<sup>27</sup> This obscure language may induce one to think that State X has to recognize a legal person invalidly created in State Y because its personality has been recognized in State Z which is participant in the convention. This, in my

4. Foundations and Trusts<sup>29</sup>

In the civil law countries, a foundation is a juristic person of private law, consisting of *assets* perpetually bound to serve a certain purpose and existing independently of any individuals. The administrators of the assets are not owners at law as is an Anglo-American trustee or as in the case of a gift subject to a charge (*donatio sub modo*).

The problem of conflicts law has been thoroughly reviewed in the litigation respecting the foundation of Niederfüllbach. King Leopold II of Belgium created a private foundation with large funds in the city of Coburg, Germany, with the governmental authorization of the Duchy of Coburg, but for purposes which were to be performed in Belgium. The experts were of the unanimous opinion that the validity of the foundation depended upon the law of the place where the "seat" or central office of administration was to be. The country where its activities had to be exercised (Belgium) was considered quite as immaterial as were the national law of the founder and the place where the deed was executed. There was controversy only upon the question whether the stipulation of the deed fixing the seat of the foundation in Coburg, corresponded with reality or was fictitious.<sup>30</sup>

Accordingly, the rule has been generally sustained that the creation, organization, capacity, and supervision of founda-

opinion, is not the meaning, nor do these words express adherence to the principle of incorporation. The same words were used by the Spanish Civil Code, art. 37, *cf.* art. 28, and did not prevent the Spanish doctrine from following the ordinary theory of central control. Probably the expression refers to the two methods in municipal law of giving birth to legal persons, namely, by special charter, the state creating the person, or by autonomy of the parties, on the grounds of statutes authorizing the creation. The expression recurs, for instance, in Guatemala, C.C. (1933) art. 17, and Honduras, C.C. art. 58.

<sup>28</sup> Código Bustamante, art. 33, *cf.* 32, on which see *infra* p. 33 n. 11.

<sup>29</sup> For comparative municipal law, see Les fondations, Part III of Travaux de la Semaine internationale de droit (Paris 1937).

<sup>30</sup> The seat was assumed to be in Coburg by App. Bruxelles (April 2, 1913) S.1913.4.9; NEUMEYER, 22 Z.int.R. 484 and Revue 1913, 15; VON LISZT, 27 Z.int.R. 125, 128; contrarily, CHARLES DE VISSCHER, Revue 1913, 183, 188.

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tions are to be governed by the law of the real central office of administration.<sup>31</sup> This is a conflicts rule substantially similar in all respects to that concerning corporations in most civil law countries.

The nearest analogue in common law to the civil law foundation is a trust created for charitable uses. If the assets of a trust are liable, apart from any liability either of the trustees or of the beneficiaries, as, e.g., under an Oklahoma statute, the analogy is very close. Since the American conflicts rules on trusts differ in regard to immovable and movable objects and according as they are created by settlement or other transaction *inter vivos* or by will, this topic is correctly treated in connection with property rather than the law of persons.<sup>32</sup> However, it may be remarked in passing that the tendency, indicated in the leading case of *Hutchison v. Ross*<sup>33</sup> and in the New York legislation,<sup>34</sup> of referring trusts settled with New York trust companies to the law of New York coincides with the continental conception. In fact, this result would be more correctly reached by localizing a trust at the place of its management rather than at the accidental situs of the assets or, still worse, by ascribing a wholly fictitious localization to choses in action held in trust.

### 5. Associations for Nonprofit Purposes

Associations incorporated for purposes other than gain have, I believe, been included in the Restatement's treatment of corporations. They are governed by a personal law, determined practically in the same manner as that of business

<sup>31</sup> German BGB. § 80; NEUMEYER, 1 Int. Verwaltungs R. 143, 146; MICHOU, 2 Personnalité Morale §§ 320, 321; ARMINJON, Revue 1902, 434; CRÉMIEU, 8 Répert. 430 No. 19. On the scope see PILLET, Personnes Morales § 300; 2 ARMINJON (ed. 2) § 178.

<sup>32</sup> Cf. Restatement § 294.

<sup>33</sup> (1933) 262 N.Y. 381, 187 N.E. 65, see also *supra* Vol. 1, 369.

<sup>34</sup> Personal Property Law, art. 2 § 12a.

corporations. Differences exist, however, in the manner of recognition. (*Infra* Chapter 22.)

*Conclusion.* In summary, we see that the recognition of public establishments raises certain problems, while foundations and nonprofit associations clearly live under a personal law analogous to that of business corporations.

## 6. Legal Persons with International Purposes<sup>35</sup>

*Supranational legal bodies.* The Holy See, before regaining temporal power by the Lateran Treaties, the International and the European Danube Commissions, and later the League of Nations were examples of autonomous organizations with undoubted capacity in private law, although not derived from one particular state. The United Nations and the Pan-American Union are now outstanding examples. Capacity is based either on multilateral conventions or on general recognition.

*Plurinational centralized legal bodies.* Such public organizations as the International Postal Union, the World Red Cross, the Union for the Protection of Literary and Artistic Works in Bern, the International Health Office in Paris, and the International Institute for Agriculture in Rome<sup>36</sup> seem to be explained as legal persons simultaneously constituted in several states. Their private law capacity, however, as a rule, flows from the one state charged with the enforcement of the underlying multilateral agreement.

*Plurinational decentralized legal bodies.* There are many hundreds<sup>37</sup> of business organizations and nonprofit associations for humanitarian or scientific purposes—among the

<sup>35</sup> See NORMANDIN, *Du statut juridique des associations internationales* (Paris 1926). GUTZWILLER, 12 *Mitteilungen dt. Ges. Völker R.* (1933) 116; FERRARA, *Le persone giuridiche*, in *Tratatto di diritto civile* (ed. Vassalli 1938) Vol. II 2, 172.

<sup>36</sup> Cass. Ital., *Sezioni Unite* (Plenary) (Feb. 26, 1931) *Rivista* 1931, 386.

<sup>37</sup> According to the lists annexed to the circulars of the International Chamber of Commerce.

oldest are the World Evangelical Alliance (1846) and the Young Men's Christian Association (1855)—which carry on activities throughout the world or over large territories, but under the present rules have to do without an adequate legal unity. They have either to seek separate incorporation in the several states or to be content with acquiring personality in one state only. Both methods have grave drawbacks. Plurinationality except under special treaties lacks sound rules thus far. An organization intended to work internationally is split into national branches, tied to a central office by free will and convenience rather than by law. Three great associations of this kind, the Institute for International Law, the International Law Association, and the International Chamber of Commerce, encouraged by a Belgian statute of October 25, 1919, allowing activity in the country to "scientific" international associations,<sup>38</sup> have inspired treaty proposals, but their efforts failed.<sup>39</sup>

*Cartels.* International cartels and business trusts, too, have felt compelled to adjust their structure to the law of one state. Where antitrust legislation, as in the United States, is not affected, the parties have been able to organize under a certain chosen law.<sup>40</sup>

But also within the United States, multiple incorporation has had a difficult development.<sup>41</sup> According to the theory

<sup>38</sup> Foreign corporations of this type are, thereby, legally recognized (art. 8); they must fulfill, however, certain conditions (arts. 2 and 3) in order to exercise their activities in Belgium. See POULLET 250.

<sup>39</sup> See Institute of Int. Law, Drafts of 1910, see *Revue* 1910, 559; of 1923, see 30 *Annuaire* (1923) 97, 348, 385; Int. Chamber of Commerce, Discussions in 1923 and 1928, cf. GUTZWILLER, *supra* n. 35, 153 n. 85; Report Politis, *Clunet* 1923, 465. All these propositions were inadvisable in fact and were disapproved in opinions by the Institute of Foreign and International Private Law in Berlin and the Institute for the Unification of Private Law in Rome.

<sup>40</sup> See REINHOLD WOLFF in 4 *Rechtsvergl. Handwörterbuch* 621; GEILER, 12 *Mitteilungen dt. Ges. Völker R.* (1933) 196; and in particular GÜNTHER HOFHEINZ, *Die Kartellbindung bei internationalen Kartellen* (Heidelberg 1939) 63ff.

<sup>41</sup> See FOLEY, "Incorporation, Multiple Incorporation, and the Conflict of Laws," 42 *Harv. L. Rev.* (1929) 516.

that a legal person is an artificial creature of the state, as many corporations were believed to exist as there were incorporating states.<sup>42</sup> This obstacle is being gradually overcome by the courts, but also in this case an entirely satisfactory solution frankly recognizing the corporate unity has not yet been reached.

*International public corporations for economic purposes.*<sup>43</sup> The most recent and important problem in this connection concerns governmental institutions functioning like private economic enterprises. The idea of clothing an undertaking with the power of government but adjusting its daily life to the pattern of business corporations was resorted to in this country when the Tennessee Valley Authority was formed and, in the international sphere, by conferring large autonomy upon the Bank for International Settlements and, to a certain extent, the United Nations Relief and Rehabilitation Administration. Recently the creation of the International Air Transport Board, the International Monetary Fund and the International Bank for Reconstruction and Development, with many other organizations proposed, predicts the rise of an international corporate life never before imagined.

## II. THE NATIONALITY OF CORPORATIONS<sup>44</sup>

### 1. Difference of Purpose from Conflicts Law

As a matter of strict classification, only conflicts problems relative to corporations should be included in the subject of

<sup>42</sup> This theory has been urged by Beale as late as in his treatise, 2 BEALE 902; cf. FUSINATO and ANZILOTTI, *Rivista* 1914, 151, 158.

<sup>43</sup> A useful summary is given by W. FRIEDMANN, "International Public Corporations," in 6 *Modern L. Rev.* (December 1943) 185. On the Bank for International Settlements, see Sir JOHN FISCHER WILLIAMS, *Am. J. Int. Law* 1930, 665.

<sup>44</sup> The best qualified guides to the literature are the following works:

YOUNG, "The Nationality of a Juristic Person," 22 *Harv. L. Rev.* (1908) 1, particularly describing the antiquated theories; SCHUSTER, "The Nationality and Domicil of Trading Corporations," 2 *Grotius Soc.* (1917) 57; ARMINJON, "La nationalité des personnes morales," 34 *Revue Dr. Int. (Bruxelles)* (1902) 381; NEUMEYER, 1 *Int. Verwaltungs R.* (1910) 106, and 12 *Z. f. Völkerrecht*

conflict of laws. However, the Restatement<sup>45</sup> and many treatises on conflicts law include a considerable part of the rules of municipal law relating to foreign corporations. The inclusion of this subject matter has some advantages; the two aspects of corporate activities, national and international, are interconnected, and the effort to separate them completely results in giving a misleading picture. However, there is a serious danger of confusion in the usual intermingling of conflicts rules with local rules. Once Pillet attempted to integrate both sets of rules in a broadly conceived law of aliens (*condition des étrangers*).<sup>46</sup> This effort could not be more successful than the opposite tendency to extend conflicts law. While all aspects of corporate activity do need to be seen in relation to one another, the conflicts rules applicable to corporate action ought to be distinguished from legal and administrative restrictions on the action of foreign corporations.

Failure to discern precisely the various purposes of the rules regarding foreign corporations has largely contributed to another unfortunate controversy, with a literature of fantastic proportions, on the question whether legal persons are able to have a nationality, as though there were to be found an answer necessarily covering international private law and all branches of public law. Although the simple truth of the matter has been known for decades to a number of writers,<sup>47</sup> the literature is too voluminous not to weigh

261; and, to be particularly recommended, NEUMEYER and GUTZWILLER, Reports, in 2 Mitteilungen dt. Ges. Völker R. (1918) 149; 12 *id.* (1933) 129; PILLET, Personnes Morales; MAZEAUD, "De la nationalité des sociétés," *Clunet* 1928, 30-66; CAUVY, 10 *Répert.* (1931) 465.

<sup>45</sup> In the long Chapter 6 of the Restatement, choice of law is treated in topic 1 (with exceptions); §§ 165, 166, topics 4 and 6.

<sup>46</sup> PILLET, *Principes* 168ff.; *id.*, *Traité* 537ff., 334ff.

<sup>47</sup> See, for instance, BALLANTINE, Corporations § 8; almost all German authors; 1 PONTES DE MIRANDA 458 § 8; Código Bustamante separating "nationality" from "capacity"; and the study originally by Gil Borges, submitted by the Delegation of Peru to the Eighth Pan-American Conference (*Diario de Sesiones*, Lima 1938, 618-8).

heavily on many minds. Numerous authors and courts persist in using a language which suggests that they still believe that a legal person, like an individual, has a nationality for all purposes. Others deny that legal persons can have any nationality at all. Both sides are right and wrong. A better view is the following.

## 2. Where Unity of Criterion Desirable

The conflicts problems of what law governs the existence and activities of a corporation, are soluble without any regard to the concept of nationality and must be solved separately from all municipal rules. Under this aspect, a corporation is called foreign when it is considered governed by the law of a foreign state. In the United States, corporations created in another state and, in Canada, those created in another province, are foreign in contrast to corporations created by Congress or by the Dominion of Canada through its Secretary of State, respectively.

But when recognition of foreign corporations and, in the more frequent cases, when carrying on of business is made dependent on reciprocity or on some kind of authorization, it may be relevant to state to which particular country a corporation is considered to belong.

In all these three respects—personal law, recognition, and permission to do business—the first two of which pertain to conflicts law and the third to administrative law, the criterion for ascribing a corporation to a determinate state should evidently be identical. This important postulate of convenience seems to have been widely neglected.

A fourth application of the same test, once a test is chosen, ought to be made in the fortunately rare cases in which conflicts rules themselves contain a discrimination between nationals and foreigners. For instance, the German rule on torts (EG. BGB. art. 12) declares that a German national



cannot be held liable for tort under foreign law to a larger extent than under German municipal law. This rule applies also to German corporations, and what is a German corporation is to be inferred from the German conflicts rule providing that a corporation centered in Germany lives under German law. Under the conflicts rules of many countries, nationals are entitled to avail themselves of the inheritance law of the forum for claiming assets found in the territory, despite divergent distributory statutes of the law governing the succession upon death.<sup>48</sup> Here the term "national" again may include legal persons.

### 3. Separate Fields

Outside of this circle of problems, there exist innumerable rules granting or denying the legal powers of domestic corporations to all foreign-created corporations or other legal persons, or to those of certain favored countries. Merely as examples, consider the multitudinous and heterogeneous provisions of taxation; the rules of jurisdiction regarding litigation of foreigners and attachment against them; the rules relating to the choice between federal and state courts; procedural burdens such as the obligation to furnish security for costs;<sup>49</sup> the prohibitions on owning or managing objects such as immovables, ships, banks, radio stations; on receipt of gifts and legacies; the principles of diplomatic protection and international arbitration.

These rules of international, administrative, fiscal, juris-

<sup>48</sup> France: Law of July 14, 1819, art. 2, *droit de prélèvement*.

Belgium: Law of April 27, 1865.

The Netherlands: Law No. 56 of April 7, 1869.

Germany: EG. BGB. art. 25 sent. 2.

Brazil: C. C. of 1916, Introd. Law, art. 14, and numerous other Latin-American codes.

<sup>49</sup> The clause of *libre accès* in the treaties is not considered as exempting from the caution *iudicatum solvi*, see Swiss BG. (July 12, 1934) 60 BGE. I 220 (construing the Treaty of Commerce of United States-Switzerland, of Nov. 25, 1850, Nov. 8, 1855).

dictional, procedural, and private law, to which those of penal law and criminal procedure may be added, are so different in purpose that they cannot be construed on the same footing, whether they refer expressly to domestic or to foreign juristic persons, or to foreigners, citizens, or nationals in general. In the correct method, each rule should be interpreted separately.

At present, the word "nationality" is intentionally avoided in connection with corporations by some British and United States official documents, consistently so by the Institute of International Law and several Latin-American statutes.<sup>50</sup> On the other hand, corporations have had nationality distinctly ascribed to them by many statutes, treaties,<sup>51</sup> and recent drafts, such as that of the Experts of the League of Nations<sup>52</sup> and the *Código Bustamante*.<sup>53</sup>

The American umpire in the Mixed Claims Commission between the United States and Germany had no doubt in describing the Standard Oil Company of New York and two other corporations as "American nationals," notwithstanding the definition of an American national, which he underlined, as "a person wheresoever domiciled owing permanent allegiance to the United States of America."<sup>54</sup>

That allegiance can properly be owed only by individuals, is the main argument used against the nationality of juristic

<sup>50</sup> *Annuaire* 1929 II 301, cf. 141, 143ff.

For a survey on the language of the Latin-American statutes, see BORGES, *Informe* 130-133.

<sup>51</sup> E.g., Peace Treaty of Versailles, art. 54 par. 3 (status of Alsace-Lorraine people); Convention on Air Navigation of Paris, Oct. 13, 1919, art. 7 par. 2. Also British Peace Order. On the varying language of the treaties, see TRAVERS, 33 *Recueil* (1930) III 28; CAVAGLIERI, *Dir. Int. Com.* 186.

<sup>52</sup> *Am. J. Int. Law* 1928, Supp. 171, 204 arts. 1, 2, 4.

<sup>53</sup> Art. 16.

<sup>54</sup> Mixed Claims Commission, U. S. and Germany, Administrative Decisions and Opinions 661, compared with the definition in Administrative Decision No. 1, *id.* 1 and 189, 193. United States on behalf of Lehigh Valley R. Co. v. Germany (Oct. 31, 1939) Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims 321, 324.

persons. But, as usual, inexact terminology is innocuous when its defects are known. If "nationality" is limited to the purposes of public law and if it is defined as the connection of a corporation with another country, there can be no harm in the use of the term. Only, it should be clear which purposes are involved and which are not. Dangerous generalizations, arising in fact from a careless use of the term nationality, conspicuously appeared when the so-called theory of control, grown up in matters of war seizure and liquidation, invaded for a time the field of conflicts law.<sup>55</sup>

However, the traditional doctrine confusing all these purposes has caused Anglo-American lawyers to look usually to the state of incorporation<sup>56</sup> and civil law lawyers to the state of central office,<sup>57</sup> as being the home state of a legal person in all respects. This view is incorrect without doubt. Nevertheless, it is a fact in itself, and the reasons or predilections that engendered the two opposite tests of personal law may well have presided also over their extension to other fields.

We may take it that incorporation here, and central office there, are widely applied criteria with a claim to subsidiary, though not normal, application.

A few illustrations must suffice. Swiss authorities constantly declare companies to be citizens and nationals of the country where they are incorporated and have their center.<sup>58</sup>

<sup>55</sup> *Infra* p. 58.

<sup>56</sup> BORCHARD, *Diplomatic Protection* § 277; SCHUSTER in 2 *Grotius Soc.* (1917) 64.

<sup>57</sup> *Cf.* 2 STREIT-VALLINDAS 82; KOSTERS 659 n. 6; Italian Council of State (May 27, 1918) *Giur. Ital.* 1918 III 150, *Rivista* 1919-20, 391-406 and Note, SALVIOLI.

<sup>58</sup> See Federal Council, BBl. 1876 III 246; 1892 II 811 (diplomatic protection); RUEGGER in *Schweizerische Vereinigung für Internationales Recht* No. 10 (1918) (neutrality); BG. (July 22, 1889) 15 BGE. 570, 579; (Feb. 28, 1895) 20 BGE. 61 and other decisions on the application of treaties on jurisdiction and establishment. For decisions of other federal agencies see SCHNITZER (Ed. 2) 280 n. 100, and *cf.* SAUSER-HALL, 50 *Bull. Soc. Législ. Comp.* (1921) 236, 248.

Similarly elsewhere, the test usual in conflicts law has been applied to foreign corporations in defining their constitutional rights<sup>59</sup> or their liability to provide security for costs,<sup>60</sup> or used as a criterion for jurisdiction<sup>61</sup> or as sufficient to establish federal jurisdiction because of diversity of "citizenship."<sup>62</sup>

Yet, in contrast with the choice of law rule of the forum, the center of a corporation may be deemed to be the nominal place designated in the charter,<sup>63</sup> or the main place of business, or despite adoption of the seat principle, the place of incorporation as such. Residence—"or some degree of residence"—is a test in England for income tax, liability to be sued, and to give security for costs,<sup>64</sup> and in the United States for the purpose of venue<sup>65</sup> or for qualifying a corporation as not liable to foreign attachment.<sup>66</sup>

<sup>59</sup> United States: *Muller v. Dows* (1876) 94 U. S. 444 (on diversity of citizenship); *St. Louis & San Francisco R. Co. v. James* (1895) 161 U. S. 545. France: Cass. (req.) (May 12, 1931) and Report Bricout, S. 1932.1.57.

England: *Limerick and Waterford R. Co. v. Fraser* (1827) 4 Bing. 394; *Edinburgh & Leith R. Co. v. Dawson* (1839) 7 Dowl. P. C. 573; *Kilkenny & Great S. and W. R. Co. v. Feilden* (1851) 6 Exch. 79, 83, Pollock, C. B.

<sup>60</sup> Austria: OGH., Opinion on § 57 ZPO., see POLLACK, *System des österr. Zivilprozessrechts* (ed. 2) 177; WALKER 149 n. 29.

France: Trib. civ. Seine (April 13, 1877) Clunet 1878, 160; Clunet 1899, 113; App. Colmar (Oct. 29, 1925) S. 1927.2.33; NIBOYET § 304; *id.*, *Revue* 1927, 402.

Germany (formerly): RG. (Nov. 25, 1895) 36 RGZ. 393.

The Netherlands: *Arnhem* (June 28, 1927) W. 11723, N.J. (1928) 438 (Scottish principal establishment determinative).

<sup>61</sup> Austria: Law of Aug. 1, 1895 (*Jurisdictionsnorm*) § 75.

France: (Competence under C.C. arts. 14 and 15) Trib. civ. Nevers (Dec. 15, 1891) Clunet 1892, 1023, Clunet 1899, 899, Clunet 1913, 1236.

Germany: ZPO. § 17.

<sup>62</sup> United States: See D. O. MCGOVNEY, "A Supreme Court Fiction," 56 Harv. L. Rev. (1943) 853.

Argentina: See 3 VICO 79 § 82.

<sup>63</sup> E.g., Germany: ZPO. § 17 (jurisdiction of courts); BGB. §§ 22, 23 (jurisdiction of administrative authorities).

Switzerland: BG (Jan. 21, 1927) 53 BGE. I 124, 131, 134 (jurisdiction over a corporation at its domicile).

<sup>64</sup> See VAUGHAN WILLIAMS and CHRUSACHI, 49 Law. Q. Rev. (1933) 337.

<sup>65</sup> Cf. 2 BEALE § 153.5.

<sup>66</sup> *Farnsworth v. Terre Haute R. Co.* (1859) 29 Mo. 75; HENDERSON 189.

Taxation<sup>87</sup> may refer to any one of these places or to that of doing business. That taxation is reasonably distributed according to the various local contacts of an enterprise is, to put it mildly, not characteristic of many systems.

The writers who have advocated one theory for everything are right in deploring the present chaotic experimentation. Obviously, however, no single theory is adequate for the task.

### III. THE LATIN-AMERICAN VIEW

In South and Central America, a peculiar current of opinion obtains, which we ought to notice and try to analyze. This trend evidently started in 1876.<sup>88</sup> When the British Government protested against measures taken in the Argentine province of Santa Fé against the Banco de Londres y Rio de la Plata en el Rosario, the Argentine Foreign Minister Irrigoyen rejected diplomatic intervention on June 23, 1876, by answering that the bank was an anonymous company (stock corporation by shares), which could not have any nationality. In a further note of August 21, he added that the entity, distinct from the members, had nothing to do with their nationality, while the entity itself was merely a capital stock. Obviously, the fiction theory was used, perhaps in the form advocated by Brinz that makes the purpose of a corporation the subject of right (theory of *Zweckvermögen*). This denial of nationality to corporations, supported in several quarters in South America,<sup>89</sup> was adopted in Rio de Janeiro in 1927 by the Committee of American Jurists repre-

<sup>87</sup> Taxation at the domicile has been regarded as the "general principle" in Europe, see ALLIX, *Recueil* 1937 III 572. The real domicile, not that indicated in the Articles of Association is decisive in France (see *infra* p. 43 f.) and the Netherlands, Rb. Amsterdam (Dec. 11, 1924) W. 11334.

<sup>88</sup> See ZEBALLOS, *Clunet* 1906, 695; ALCORTA, 2 *Der. Int. Priv.* 38-40.

<sup>89</sup> The doctrine is a part of the general complaints advanced, for instance, by SEIJAS (Venezuela), 11 *Annuaire* (1889-92) 442. See also TRAVERS, *Recueil* 1930 III 37.

senting seventeen republics, and was repeatedly expressed on the occasion of the signatures to the *Código Bustamante* in Habana, 1928. The Argentine Delegation signed the treaty (which later was not ratified by Argentina) with the reservation that:

"It does not approve provisions affecting directly or indirectly the principle upheld by the civil and commercial legislation of the Argentine Republic to the effect that 'juristic persons owe their existence exclusively to the law of the State which authorizes them and are therefore neither national nor foreign; their functions are determined by said law, in accordance with the precepts derived from the "domicile" which that law acknowledges to such persons.'"<sup>70</sup>

And the Delegations of Colombia and Costa Rica observed:

"Juristic persons cannot have any nationality either under scientific principles or in the view of the highest and most permanent interests of America. It would have been preferable that in this Code, which we are going to enact, there should have been omitted everything which might serve to assert that juristic persons, particularly those with capital stock, have nationality."

To satisfy this so-called Argentine doctrine, the Constitution of Colombia of 1936, for instance, which repealed the article of the Constitution of 1886 requiring reciprocity for the recognition of foreign corporations, limited itself to the statement in Article 12:<sup>71</sup>

The capacity, the recognition, and generally the regime of companies and other juristic persons are determined by Colombian law.

This does not mean that Colombian internal law should always be applied; conflicts rules may be established, but

<sup>70</sup> Reservation 4; practically similar, the reservations of the Paraguayan (3) and the Dominican Delegations (2, cf. 3).

<sup>71</sup> Cf. TULIO ENRIQUE TASCÓN, *Derecho Constitucional Colombiano* (ed. 2, 1939) comment on art. 12.

the intention is clear not to recognize as corporations belonging to a foreign country those operating within Colombia.

Thus, an erroneous legal theory was developed as a justification for political action. The aim was to defend against diplomatic intervention, on the background of unpleasant remembrances of foreign complaints, naval demonstrations, and claims to arbitrate expropriations and riot damages, before the era of the good neighbor policy.

As a positive support for the rule, it has often been adduced that foreigners, whether individuals or legal persons, have equal civil rights with nationals, a general Latin-American progressive rule, emphasized in nearly all constitutions. The argument, of course, tends to imply that a company enjoying all privileges of domestic fellow-companies, has no claim to anything more. But, even if equality were not riddled with exceptions<sup>72</sup> and the conclusion were true, logic would lead to the conversion of all corporations into domestic legal persons rather than into persons not belonging to any state.

As a matter of fact, the stand taken by the Mexican Government in 1938 in the case of the Eagle Oil Company, was that British intervention was excluded because the legal person was Mexican, whereas the British Government complained of the forced local incorporation of the company.<sup>73</sup>

Also, the very frequent legislative acts of Central and South American governments barring foreign corporations

<sup>72</sup> See the impressive discussion of the legal reality of the Latin-American countries "as to the civil inequality of foreigners" by ZORRAQUÍN BECÚ, *El Problema del Extranjero en la reciente legislación latino-americana* (Buenos Aires 1943) 93, 95 and ff.

<sup>73</sup> Note of April 12, 1938. The British government replied (note of April 21, 1938) that "if a government first can make the operation of foreign interests in its territories dependent upon their incorporation under local law and then plead such incorporation as the justification for rejecting foreign diplomatic intervention," . . . (39 Bull. Inst. Int. (1938) 67). See also JOSEF L. KUNZ, *The Mexican Expropriations* (New York 1940) at 49; and documents cited by 2 HYDE 908.

from business without special authorization, have a tendency toward requiring domestication.<sup>74</sup>

These remarks have had the exclusive purpose of conceptual clarification. While a book like the present does not deal with political aspects, the universal need of international collaboration will have to be stated at the end of this part. But the conclusion should be drawn at once that an equitable compromise between the interests of invested capital or skilled techniques and those of the territorial population, cannot be obtained either by artificial theories or by denying the existing international connections. Indeed, international law, apart from all possibly doubtful problems, permits a government to extend diplomatic protection to a corporation constituted in its territory, and at least under some circumstances, to espouse the cause of nationals who are holders of a considerable part of the capital stock or bonds.<sup>75</sup>

Both the Treaties of Montevideo and of Habana have distinctly perceived the necessity of connecting public and private legal persons with determinate states, and the latter has simply called this connection nationality.<sup>76</sup> The same is true of many Latin-American statutes and constitutions.

#### IV. DOMICIL OF CORPORATIONS

Another futile controversy based on traditional concepts for a long time has existed concerning whether and where corporations have a domicile.<sup>77</sup> These questions originated in

<sup>74</sup> See *infra* p. 185.

<sup>75</sup> BORCHARD, *Diplomatic Protection* (1915) 622; CHARLES DE VISSCHER, "La technique de la personnalité juridique en droit international public et privé," 63 *Revue Dr. Int. (Bruxelles)* (1936) 475, 484; CHARLES DE VISSCHER, "Le déni de justice en droit international," 52 *Recueil* (1933) II 387; 2 HYDE § 279.

<sup>76</sup> Código Bustamante, art. 16.

<sup>77</sup> For American law, see the brilliant article by J. F. FRANCIS, "The Domicil of a Corporation," 38 *Yale L. J.* (1928-29) 335. For a recent comprehensive, though objectionable, treatise, see A. FARNSWORTH, *The Residence and Domicil of Corporations* (1939), reviewed by KAHN-FREUND, *Annual Survey of English Law* (1939) 374; F. A. MANN, 3 *Modern L. Rev.* (1940) 174.



the same practical grounds as the question regarding nationality. In large part, tax laws, commerce regulations, and jurisdictional rules were drafted originally with only individuals in view. Lawyers had to construe the legislative references to domicile with respect to corporations and partnerships. Unfortunately, many solutions are unsatisfactory, as when corporations are said to have no domicile but only "residence" or, at common law, are said to have several domicils in contrast to physical persons.

As an outgrowth of the fiction theory, in the United States every corporation is declared to be "domiciled" at its principal office in the state of incorporation<sup>78</sup> and, in the absence of an actual office, at a substituted fictitious business place in such state. In the words of the Supreme Court:

"This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it."<sup>79</sup>

Hence, a corporation has a necessary domicile by force of law in the state where it was incorporated and cannot acquire a domicile outside that state.<sup>80</sup> This rule is also settled in Canada apart from Quebec.<sup>81</sup> In other words, a corporation is localized by its creation in a certain state and by this fact is domiciled there.

Obviously, this doctrine would be quite as well expressed by omitting any reference to the concept of domicile and by

<sup>78</sup> Restatement § 41 comment a.

<sup>79</sup> *Bank of Augusta v. Earle* (1839) 13 Pet. S. C. 519; *Shaw v. Quincy Mining Company* (1892) 145 U. S. 444, 450 citing the case of *Bank of Augusta* with approval.

<sup>80</sup> Restatement § 41 and comment b. Mr. Justice Holmes in *Bergner & Engel Brewing Co. v. Dreyfus* (1898) 172 Mass. 154, 51 N.E. 531; 1 BEALE § 41.1.

<sup>81</sup> *Bank of Nova Scotia v. McKinnon* (1892) 12 C. L. T. (Occasional Notes) 178 N. B.; *Victoria Machinery Depot Co. v. The Canada* (1913 B. C.) 17 D. L. R. 27; 1 JOHNSON 175 n. 2.

simply referring to the state of charter.<sup>82</sup> Moreover, the purposes for which this fiction of a domicile has been invented, are mainly taxation and jurisdiction, and, although in these matters the state of first incorporation has retained some significance, it has not such a prominent role at present as to justify an exclusive qualification as center.<sup>83</sup> In the very last years, first the entire intangible personality, wherever located, and then the entire revenue from securities have been deemed susceptible of taxation in the state in which a corporation has its principal place of business. The state of charter, however, does not seem to be correspondingly eliminated.<sup>84</sup>

In most civil law countries a corporation is localized for conflicts purposes as well as for many others, at its "seat,"<sup>85</sup> i.e., in the place where central control and management is exercised. The same definition is unanimously given by English writers<sup>86</sup> for such matters as taxation and trading with the enemy.<sup>87</sup>

The English and American opposition to the general attitude of the civil law reverses in curious fashion the contrast existing in determining the status of individuals. On the Continent, the status of a corporation is subject to the domiciliary test, applied to individuals at common law, which, in

<sup>82</sup> See HENDERSON 190; FOSTER, *Recueil* 1938 III 455.

<sup>83</sup> See FRANCIS, *supra* n. 77, 352, 353.

<sup>84</sup> *Wheeling Steel Corp. v. Fox* (1936) 298 U. S. 193; 35 Mich. L. Rev. (1936) 1032; *Chestnut Securities Co. v. Oklahoma Tax Commission* (C.C.A. 10th 1942) 125 F. (2d) 571, (1942) 316 U. S. 668; Note, HOFFEINS, 41 Mich. L. Rev. (1942) 559.

<sup>85</sup> See below.

<sup>86</sup> DICEY, Rule 19, 136; FOOTE 119; WESTLAKE 368; SCHUSTER, "The Nationality and Domicil of Trading Corporations," 2 *Grotius Soc.* (1917) 59, 69; CHESHIRE 197.

<sup>87</sup> By an inadequate argumentation, FARNSWORTH, *supra* n. 77, first contends a priori that domicil must determine the "status" of a corporation (pp. 210, 231) and then impeaches the dominant opinion of the English writers because the usual definition of the domicil (as a central place of control) would give the corporation a status impossible in English law (p. 274). The author denaturalizes the conception of domicil to no useful purpose at all.

reference to corporations, repudiates its own familiar criterion and adopts that of the legal connection; this inversion seems to have struck some English lawyers so much that they have thought that a "domicil of origin" should be construed as in the country of incorporation.<sup>88</sup> The *Código Bustamante* (art. 16) mentions a "nationality of origin." These conceptions seem to correspond to the doctrine of this country assuming a necessary domicil in the state of incorporation.

<sup>88</sup> See recently, FARNSWORTH, *supra* n. 77, 209.

## CHAPTER 19

# The Personal Law of Business Corporations

IN LOCALIZING the personal law of legal persons, the two chief rival systems may be termed the *incorporation principle*, pointing to the law of the state of incorporation as such, and the *central office principle*, which needs explanation.

### I. LAW OF THE STATE OF INCORPORATION

*Anglo-American law.* In all common law countries, a corporation lives under the law under which it has been created<sup>1</sup> or "incorporated," the law from which, in Westlake's expression, it "derives its existence."<sup>2</sup> The English cases, the oldest of which dates from 1724, have always followed this theory.<sup>3</sup> The particular historic or rational causes for this rule are not known, although it originated upon the current background of pedantic axioms now antiquated. In any event, the rule appears to have been accepted as self-evident. It is not astonishing that common law lawyers should think so, since even some Continental writers, educated under the opposite system, have advocated the Anglo-American principle as the logical outgrowth of the act of constituting a corporation.<sup>4</sup>

In fact, the proposition that the legal entity of an association as a body separate from the members must be based

<sup>1</sup> DICEY 544; 1 WHARTON 238 § 105a.

<sup>2</sup> WESTLAKE 367.

<sup>3</sup> *Dutch West India Co. v. Henriques Van Moses* (1724), 1 Strange 612; *FOOTE* 162 and in *Clunet* 1882, 465 at 473, n. 2.

<sup>4</sup> See *infra* p. 66 n. 129.

upon the law of a particular state, is obvious under any possible theory. But this is not the point. The problem is whether the conflicts rule should be satisfied with the formal creation of a corporation in *some* state. The Anglo-American rule is satisfied; the fact of incorporation alone suffices. Thus, the English Companies Acts are held inapplicable to companies registered abroad,<sup>5</sup> and the personal law of a company "depends not upon the place at which its center of administrative business is situated, but upon the place at which it is registered."<sup>6</sup> And very distinctly the firmly settled American rule refuses to take account of the place where the activities of an association occur. As the Restatement puts it:

"§ 152. Without regard to the place of the activities of an association or to the domicile of its members, incorporation may take place in any state . . .

"§ 154. The fact of incorporation by one state will be recognized in every other state."

This conception ought to be examined in terms of considerations of convenience rather than of logic.

*Other countries.* The law of the state of incorporation is said to be applied in the Soviet Union.<sup>7</sup> It is apparently contemplated also in the language of the recent legislation of Peru (1936) and Brazil (1942), referring to the law of the state where the corporation has been "constituted,"<sup>8</sup> and in a few other Latin-American legislations.<sup>9</sup> The corresponding

<sup>5</sup> See YOUNG 182, 205.

<sup>6</sup> YOUNG 205 comment on Attorney General v. The Jewish Colonization Ass'n (1900) 2 Q. B. 556, C.A.; [1901] K. B. 123.

<sup>7</sup> Thus, in absence of a proper source, with feeble support in a former instruction, MAKAROV, 35 Recueil (1931) I 473 at 524ff. and Précis 225; RABBINOWITSCH, 1 Bl.IPR. 212; but see also STOUPNITZKY, Revue 1927, 418 at 442.

<sup>8</sup> Peru: C. C. (1936) Tít. Prel., art. IX par. 1.

Brazil: Introd. Law (1942) art. 11 par. 1; cf. IRIGOYEN, Consultas de la Comisión de Reforma 14 (but see *infra* p. 35).

<sup>9</sup> Cuba: C. Com. art. 15; C. C. art. 37.

Guatemala: C. C. (1933) art. 20.

text of the Montevideo Treaty on Civil Law<sup>10</sup> actually was changed in 1940 so as to refer to the law of the domicil of the association.

The *Código Bustamante* (art. 17) refers to this "nationality of origin" of associations, but not to determine the law applicable to them (art. 33), including a set of rules inapplicable to all commentators.<sup>11</sup>

## II. LAW OF THE PLACE OF CENTRAL CONTROL

### I. Countries

In most civil law countries, the personal law of a private law corporation is that of the state in which it has its center or "domicil," French "*siège social*," German "*Geschäftssitz*" (seat).

This system has been followed by:

Austria: Ges.m.b.H. Ges. (Act on Limited Partnerships) of March 6, 1906, § 107 and common opinion, see Walker 147; Ehrenzweig-Krainz § 82 n. 4.

Belgium: Lois coordonnées sur les sociétés commerciales (Consolidated Companies Act, 1873) art. 172; revised (1935) art. 196; Belgo-German Mixed Arb. Trib., 3 Recueil des décisions 573.

Bulgaria: Act of Limited Partnerships, of May 8, 1924, art. 127.

Denmark: S. Ct. (Nov. 8, 1917); (March 8, 1922) see 6 Répert. 217 No. 29.

Uruguay perhaps likewise: C. C. (1914) Tit. Fin., art. 2394: "where a legal person has been recognized as such," as amended November 25, 1941.

<sup>10</sup> Art. 4 par. 1. The official report in Republica Argentina, Congreso Sudamericano 146 shows some disagreement with this change.

<sup>11</sup> Código Bustamante, art. 34 refers the civil capacity of civil, commercial, or industrial companies to the respective stipulations of the contract of association. Cf. art. 18 and see the criticism by Gil Borges, reproduced in the motion made by the Delegation of Peru, Diario de Sesiones, Octava Conferencia Internacional Americana, Lima, 1938, 118. See, moreover, art. 32, which was not contained in the draft of De Bustamante, and has been sharply censured in 2 PONTES DE MIRANDA 448.

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France: Cass. (civ.) (June 20, 1870) S. 1870.1.373; Cass. (req.) (March 29, 1898) S. 1901.1.70. Associations are specially discussed by 2 Arminjon § 199.

Germany: RGZ. Vol. 7, 70; Vol. 83, 367 (a business corporation of Wisconsin); Vol. 88, 54; Vol. 92, 73; Vol. 117, 217; Vol. 159, 46; Aktiengesetz of Jan. 30, 1937, § 5.<sup>12</sup>

Greece: Decisions up to 1934: 2 Streit-Vallindas 79 n. 9; for 1935-1937, Note in Clunet 1938, 613.

Hungary: C. Com. arts. 210, 211; Act on Limited Partnership, § 106 (implicit).

Italy: Consiglio di Stato (May 27, 1918) Giur. Ital. 1918 III 153, Note, Salvioli, Rivista 1919-20, 391; Cass. (July 13, 1936) Rivista 1938, 225; Diena, 2 Princ. 290; D'Amelio, Clunet 1917, 1235.

Liechtenstein: P.G.R. art. 232 par. 1.

Montenegro: C.C. art. 787.

The Netherlands: General opinion based on Rv. art. 4 (2) (3); Rb. Rotterdam (Oct. 25, 1916) N.J. (1917) 270; and others; Medan (Dec. 4, 1925) 124, Indisch Tijdsch. 242. See also Kusters 659; Mulder 198. *Contra* for *lex fori*, only one decision, Rb. Amsterdam (Dec. 19, 1924) W.11346, N.J. (1925) 1065.

Poland: Int. Priv. Law, art. 1 No. 3; Interlocal Priv. Law, art. 3 No. 3.

Rumania: C. Com. (1938) art. 353.

Spain: C. C. art. 28, cf. Trías de Bes 379.

Switzerland: C. C. art. 56; BG. (Dec. 8-14, 1904) 31 BGE. I 418, 466, 473; (April 1, 1924) 50 BGE. II 511, Clunet 1924, 785; (May 23, 1928) 54 BGE. II 257, 271; Federal Council, Message of August 20,

<sup>12</sup> Decision in the special case of "Gothaer Gewerkschaften" does not justify the objections raised by some writers to the general rule, see MELCHIOR 466; RAAPE 154.

1919 introducing the revised draft of the Code of Obligations, BBL. 1919 V 720.

Turkey: Law of Nov. 30, 1330/1914, art. 1, *cf.* 7 Répert, 250 No. 127.

Yugoslavia: C. Com. (1937) § 501 par. 1.

China: Int. Priv. Law, art. 3.

Egypt: App. Alexandria (Feb. 19, 1927) S. 1927.4.9.

Japan: C. C. art. 50; C. Com. arts. 44 and 258, on which see Chapter 19 at n. 63 (better opinion).

Argentina: C. C. arts. 6 and 7, *cf.* art. 34; see 3 Vico § 81; Zeballos, Clunet 1906, 604; C. Com. art. 286.

Brazil: Thus far prevailing opinion, see Carvalho de Mendonça, 4 Trat. Dir. Com. § 1513, *cf.* Espinola, 8-C Tratado 1777 § 100.

Colombia: Código Judicial, art. 272; see Caicedo § 71.

Honduras: Foreigners' Law, Decree No. 31 of Feb. 4, 1926, art. 4.

Mexico: "Almost unanimous doctrine," see Caso § 193.

Venezuela: C. Com. (1919) art. 359 (new 334), at least with respect to Venezuelan corporations, see Crawford, 12 Tul. L. Rev. (1938) 219.

Treaty of Montevideo on Commercial Law (1889) art. 5; on Com. Terr. Law (1940) art. 8 par. 1; on Civil Law (1940) art. 4 par. 1.

Also, numerous bilateral treaties assuring the establishment of nationals of one contracting state in the territory of the other party have adopted the same principle. It is natural that civil law countries should do so among each other,<sup>13</sup> but rather

<sup>13</sup> For instance: France with Japan (Aug. 19, 1911) art. 4, 105 British and Foreign State Papers (1912) 101 at 603; with Greece (March 11, 1929) art. 20, par. 1, 95 L. of N. Treaty Series (1929) 401 at 415, 134 British and Foreign State Papers (1931) 773 at 781; with Germany (Aug. 17, 1927) art. 26, 76 L. of N. Treaty Series (1928) 7 at 24, 126 British and Foreign State Papers (1927) Part I, 689 at 700; with Czechoslovakia (July 2, 1928) art. 22, 99 L. of N. Treaty Series (1930) 107 at 121, 129 British and Foreign State Papers (1928) Part II, 305 at 314; with Cuba (Nov. 6, 1929) art. 7,



strange that they do not do it in every treaty.<sup>14</sup> On the other hand, it is remarkable that even the United States, Great Britain, and the Soviet Union in some<sup>15</sup> of their treaties, especially in recent times,<sup>16</sup> have employed the usual European formula, running for instance in the treaty of the United States with Germany as follows:

“Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws,

par. 1, 114 L. of N. Treaty Series (1931) 360 at 363, 131 British and Foreign State Papers (1929) Part II, 194 at 197; Germany: see the list of treaties in MELCHIOR 476 n. 2.

<sup>14</sup> E.g., Germany with Italy (Oct. 31, 1925) art. 8, par. 1, 52 L. of N. Treaty Series (1926) 179 at 185 and 311 at 315, 124 British and Foreign State Papers (1926) Part II, 629 at 631; Germany with Sweden (May 14, 1926) art. 5, par. 1, 51 L. of N. Treaty Series (1926) 99 at 103 and 145 at 147, 124 British and Foreign State Papers (1926) Part II, 741 at 743.

Similarly, Swiss treaties up to 1892, see SCHNITZER, *Handelsr.* 81 who thinks it was done under the influence of the fiction theory.

<sup>15</sup> Incorporation (“Constitution”) alone is mentioned, e.g., in the treaty of U.S.S.R. with Iran (Aug. 27, 1935) art. 8, par. 1, 176 L. of N. Treaty Series (1937) 299 at 305; U.S.S.R. with Turkey (March 16, 1931) art. 7, 134 British and Foreign State Papers (1931) 1128 at 1130. In the treaty United States with Greece (Nov. 21, 1936) art. 1, U. S. Treaty Series No. 930, 183 L. of N. Treaty Series (1937) 169 at 170, corporations and associations “of the United States and of Greece” are mentioned.

<sup>16</sup> United States with Germany (Dec. 8, 1923) art. 12, par. 1, U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141; with Hungary (June 24, 1925) art. 9, U. S. Treaty Series No. 748, 58 L. of N. Treaty Series (1926) 111 at 117; with Honduras (Dec. 7, 1927) art. 13, par. 1, U. S. Treaty Series No. 764, 87 L. of N. Treaty Series (1929) 421 at 430; with Austria (June 19, 1928) art. 10, par. 1, U. S. Treaty Series No. 838, 118 L. of N. Treaty Series (1931) 241 at 250; with Poland (June 15, 1931) art. 11, par. 1, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407; Great Britain with Germany (Dec. 2, 1924) art. 16, par. 1, 43 L. of N. Treaty Series (1926) 89 at 98, 119 British and Foreign State Papers (1924) 369 at 374; South African Union with Germany (Sept. 1, 1928) art. 15, par. 1, 95 L. of N. Treaty Series (1929) 289 at 297, 128 British and Foreign State Papers (1928) Part I, 473 at 478. The German text of both treaties translates “established” and “gevestigd” (Dutch) by “errichtet.” Thus, the British side would accept the continental principle and the German side the British principle; but the German translation is incorrect, as 1 FRANKENSTEIN 484 n. 183 shows. U.S.S.R. with Italy (Feb. 7, 1924) art. 9, 120 British and Foreign State Papers (1924) 659 at 662; with Germany (Oct. 12, 1925) art. 16, par. 1, 53 L. of N. Treaty Series (1926) 85 at 97, 122 British and Foreign State Papers (1925) 707 at 714; with Norway (Dec. 15, 1925) art. 5, 47 L. of N. Treaty Series (1926) 9 at 15, 122 British and Foreign State Papers (1925) 992 at 994.

National, State, or Provincial, of either High Contracting Party and maintain a central office within the territories thereof . . .”

To the same effect, international arbitrations involving the United States,<sup>17</sup> proposals of the Institute of International Law (1891, 1929, 1933),<sup>18</sup> of the subcommittee of experts for the League of Nations<sup>19</sup> (1927), and treaties for avoiding double taxation<sup>20</sup> can be cited. Only in the draft of the committee, reporting to the Diplomatic Conference on the Treatment of Foreigners, in Paris, 1929, has the Anglo-American view been maintained by adding to the usual formula that, in the case of countries to the laws of which the concept of a seat of a company is unknown, the condition established on this point will not be applicable.

Certain subtle divergences among these texts are negligible. They clarify the subject on one point which will be examined immediately. None of them has taken the cases of renvoi into consideration. (See *infra* p. 50.)

## 2. Significance of the Principle

In fact, corporations usually have their central office in the country where they obtain incorporation, but not necessarily so, and in the United States often not. A corporation consti-

<sup>17</sup> United States with Peru (1869) *Affaire Ruden et Cie.* (partnership consisting of Mr. Ruden, an American citizen, and Mr. J. P. Escobar, citizen of New Granada) see LAPRADELLE-POLITIS, 2 *Recueil des arbitrages internationaux* (1856-1872) 589.

United States with Chile (1901), case of Henry Chauncey, société en commandite in Valparaiso, see MOORE, 3 *Digest* 802.

<sup>18</sup> *Annuaire* 1929 II 147, Meeting in New York, 1929, proposed regulation, art. 1.

<sup>19</sup> Art. 1 (Am. J. Int. Law 1928, Supp. 204) concerning the “nationality of commercial corporations,” including the personal law.

<sup>20</sup> The British-Swiss Treaty against double taxation, of October 17, 1931, art. 3, 131 L. of N. Treaty Series (1933) 245 considers a company as having domicile in the forum, if the management and control of the business is in the forum. “Control” has been explained in an exchange of notes (*id.* 264) to mean effective management and the real center.

tuted in Delaware with headquarters in Amsterdam will be considered subject to Dutch law on the whole European Continent, and therefore on principle as nonexistent. The true point of difference between the two systems is not that under the one incorporation is sufficient, and in the other the situation of the main office would suffice to determine the personal law. The statutes do not define the Continental system so correctly as do the treaties providing that a corporation must be organized or constituted in one of the two countries *and* have its central office (seat, domicile) in the country where it is constituted. The requirement of domicile is additional to that of incorporation and does not by any means replace it. Hence, the Continental rule is no more than a variant of the common law rule and could well be adopted in the treaties of any state.

While this essence of the rule has often been misunderstood, especially in the English literature and by German writers too, the policy behind the rule also has not always been appreciated. The most important viewpoint from which to consider the rule is that of a state that does not want an organization to establish its principal office in its territory and yet derive its existence and legal character<sup>21</sup> from a foreign state. Thus, in the oldest decision of the German Supreme Court on this matter, a company incorporated in the state of Washington, United States, for the purpose of exploiting Mexican mines, but which was controlled by a board of directors in Hamburg, Germany, was denied recognition as an American legal entity; having failed to fulfill the German requirements for incorporation, it was treated as a German noncorporate association.<sup>22</sup> When a domestic company transfers

<sup>21</sup> Not only capacity, in contrast to formation and dissolution, as WESTLAKE-BENTWICH (ed. 6) 368 believe.

<sup>22</sup> RG. (March 31, 1904) DJZ. 1904, 555, *cf. infra* p. 100. VON STEIGER, 67 ZBJV. (1931) 307 reports the case of a joint stock company, incorporated in Kenya, East Africa, under British law, but administered in Paris, France. In Kenya, there was only a representation and the technical management. This corporation would be recognized neither under the French nor any other Continental conflicts rule.

its domicile to a foreign country, it loses its personality.<sup>23</sup> Whatever the policy of the country may be in regard to capital interests, cartels, minority and small stockholders, plural votes, and the like, organizations established with headquarters in the country have to comply. French lawyers particularly insist on the necessity of preventing evasion of imperative requisites and prescriptions. In contrast to the recognition of the law of the incorporating state "without regard to the place of the activities of an association" (Restatement § 152), the state of the central office is considered the most vitally interested.

Then again, the state where incorporation is obtained, may not want its law to be used for organizations intending to maintain their real existence abroad. Switzerland once cancelled the registration of numerous French-controlled companies, incorporated but only nominally established in Geneva.<sup>24</sup> Belgian courts proceed likewise.<sup>25</sup>

### 3. Concept of Central Office

For a time, eminent French authors conceived the most significant place for localizing a business corporation to be the place at which it discharges its functions, viz., carries on its manufacturing, trading, or other activities indicated in the charter. Where the main part of such technical work is done—the *siège d'exploitation*—there they regarded the corporation as centered.<sup>26</sup>

<sup>23</sup> RG. (June 5, 1882) 7 RGZ. 68.

<sup>24</sup> Advice by the Swiss Federal Department of Justice and Police to the canton of Geneva, see BURCKHARDT, 3 Bundesrecht 1022 III.

<sup>25</sup> See Trib. civ. Bruxelles (Feb. 26, 1923) *Novelles Belges*, 3 D. Com. 676 § 5202.

<sup>26</sup> Notably 2 LYON-CAEN et RENAULT §§ 1167ff.; THALLER, *Annales de Droit Commercial*, 1890 II 257; WEISS, 2 *Traité* 481.

To the same effect see the English case *Keynsham Blue Lias Lime Co. v. Baker* (1863) 33 L. J. Exch. 41.

*Contra*: See as to France, ARMINJON, 2 *Précis* § 188, as to England, YOUNG 194.

This concept, in fact, is of some relevance for taxation and certain other phases of the legal position of corporations.<sup>27</sup> With respect to conflicts law, however, this theory has been generally rejected. Even though the Belgian Companies Law has made the "principal establishment" the test, a literal interpretation has been long since abandoned.<sup>28</sup> Also, in the systems under which the center of exploitation suffices to subject a company to the domestic law (*infra* pp. 46ff.), the seat of an organization is identified with its chief executive office.

The office where the central management and control are exercised is regarded as the brain of an enterprise. "It is there that its personality manifests itself, for it is there that its organs operate, directing its operations and controlling its policy," thus Young reproduces the Continental conception.<sup>29</sup> The legally important decision on commercial contracts is commonly concentrated there. In addition, factories or premises may be dispersed in several countries and no main working place discernible, whereas every corporation is supposed to have its headquarters at a single place. The law of this place, therefore, is unanimously held decisive.<sup>30</sup>

However, the place must be ascertained. Normally, stockholders and directors hold their regular meetings in the same town, where also the head executives have their offices, books and archives are kept, transactions with customers are negoti-

<sup>27</sup> However, in France jurisdiction for bankruptcy proceedings is taken at the central office of the management, not at that of exploitation (advocated by THALLER, *Traité élémentaire de droit commercial* (ed. 7, 1925) § 1738 and others, cf. VALENSI, 8 *Répert.* 328). See on the question Cass. (req.) (July 31, 1905) S.1906.1.270; *id.* (Nov. 26, 1906) S.1909.1.393.

<sup>28</sup> Belgium: Consolidated Companies Laws, of 1873, art. 129; of 1935, art. 197; POULLET § 225; *Novelles Belges*, 3 D. Com. 682 § 5248.

<sup>29</sup> YOUNG 149.

<sup>30</sup> Belgium: Trib. civ. Bruxelles (Nov. 14, 1911) *Revue* 1913, 178; Trib. com. Gent (May 4, 1914) *Clunet* 1917, 1087; and (Feb. 26, 1923) cited by POULLET § 264.

Denmark: BORUM and MEYER, 6 *Répert.* 217 No. 30.

France: Cass. (civ.) (June 20, 1870) S.1870.1.373; (March 29, 1898)

ated, and the principal business is managed. But these activities may fail to be assembled. Where the management is centered is then considered a question of fact-finding by an evaluation of many circumstances.<sup>31</sup> As a last resort in the prevailing opinion, the place where the directors usually meet is the most important, as their decisions are of direct effect,<sup>32</sup> while others hold that the general meetings of stockholders are more significant, since they instruct the board.<sup>33</sup> Preferably individual solutions should not be prejudiced by any such rigid criteria. They need an examination of symptoms, similar to that used in America and England for determining the "domicil" or "residence" of a corporation for purposes of jurisdiction or taxation.<sup>34</sup> For example, the Cesena Sulphur Co. was incorporated in England to exploit sulphur mines in Sicily. The managing directors, the main books, the accounting and two-thirds of the stockholders were in Italy, but since the meetings of the board of directors and the general stock-

D.1899.1.595; S.1901.1.70, Clunet 1898, 756; (July 6, 1914) Clunet 1916, 1296; (Dec. 24, 1928) Gaz. Pal. 1929.1.124; see also HOUPIN et BOSVIEUX, 3 *Traité des sociétés* (ed. 6, 1929) § 2124.

Germany: BGB. § 24: "Unless it is otherwise provided, the place where the administration of a corporation is carried on is deemed to be its seat." Same for foundations BGB. § 80 and for jurisdiction ZPO. § 17.

Italy: Cass. (July 31, 1925) Foro Ital. Rep. 1925, 313, "Competenza" Nos. 377, 378; Cass. (April 17, 1931) Foro Ital. 1931.1.602.

Japan: See DE BECKER, *Int. Priv. Law* 59; but cf. *infra* p. 48.

Switzerland: BG. (Dec. 14, 1904) 31 BGE. I 418, 471.

<sup>31</sup> In opposition to this method, 2 ARMINJON § 190 objects to conferring upon the courts the power of discretionally determining the center of a company. However, Arminjon's own theory ("*Nationalité des personnes morales*," *Revue* 1902, 381; 2 *Précis* § 191) is obscure and seems not very different (see 2 *Précis*, ed. 2, 483 n. 2). The French doctrine is generally unstable because of the endless fear of *fraude*.

<sup>32</sup> See PERCEROU, Note, D.1910.2.41; CUQ, *Nationalité des sociétés* (1921) 63; LEVEN, *De la nationalité des sociétés* (thèse Paris 1899) 58; HOUPIN et BOSVIEUX, 3 *Traité des sociétés* § 2205.

<sup>33</sup> Código Bustamante, arts. 18, 19; PILLET, *Personnes Morales* § 94; for Spain, see TRÍAS DE BES, *Estudios* 381. For location of a corporation within the state, 1 BEALE 240.

<sup>34</sup> FARNSWORTH, *The Residence and Domicil of Corporations* (1939) 248, 274.

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holder meetings took place in London—not because of the English incorporation—residence within the meaning of the Income Tax Acts was held to be in England.<sup>35</sup>

Conscious of the possible divergencies in determining the place of central control, the Geneva subcommittee proposals of 1929 leave the legal definition to the “municipal law under which the company was formed and its seat established.”<sup>36</sup>

### 4. Real Existence of the Central Office

It may happen that the central establishment of an organization is actually situated in a country other than that designated by the constitutional documents. The act of incorporation need not necessarily be void, for this reason alone, under the law of either country. But it is common opinion that the personal law is conferred upon the organization only by the state of the actual chief office: the *siège social* must be real, not fictitious.<sup>37</sup> The indication of a central place in the charter or by-laws furnishes but *prima facie* evidence.<sup>38</sup>

This is also the distinct doctrine of the German courts and leading writers<sup>39</sup> in conflicts law, as well as with respect to tax liability,<sup>40</sup> although in other matters such as jurisdiction of courts<sup>41</sup> and administrative agencies<sup>42</sup> the “seat” nominally

<sup>35</sup> *Cesena Sulphur Co. v. Nicholson* (1876) 1 Ex. D. 428.

<sup>36</sup> *Am. J. Int. Law* 1928, Supp. 204 art. 3 par. 1.

<sup>37</sup> Recognized in all international resolutions cited *supra* sub (b). For the prevailing Italian doctrine see *V. TEDESCHI, Del domicilio* (1936) 350.

<sup>38</sup> *Swiss BG.* (July 22, 1889) 15 BGE. 570 No. 79; *COSTE-FLORET, 1 Revue générale de droit commercial* (1938) 577 at 586.

<sup>39</sup> *RG.* (June 29, 1911) 77 RGZ. 19; *RGR. Kom. n. 4* before § 21; § 22 n. 4; *STAUDINGER-RIEZLER, 1 Kommentar* § 24; *WIELAND, 2 Handelsr.* 79. *Contra*: a small minority of writers who claim 99 RGZ. 217 as authority.

<sup>40</sup> *Tax Procedure (Reichsabgabenordnung)* § 52, see the commentary by *BECKER, Die Reichsabgabenordnung* (ed. 7, 1930) 188 § 2.

The Fiscal Convention between France and Germany, of Nov. 9, 1934, art. 13 adopted the French definition of the “*siège*” as the place where the legal, financial, administrative, and technical management is centered in a permanent manner, see *MICHEL, Revue Crit.* 1937, 630.

<sup>41</sup> Germany: *ZPO.* § 17.

<sup>42</sup> *BGB.* §§ 22, 23, 25.

indicated in the articles of incorporation may be determinative.<sup>43</sup>

The French courts have strangely extended the scope of this idea. They, too, naturally disregard a fictitious domicil and look to the actual *siège social*.<sup>44</sup> For example, the "Boston Blacking and Co.," constituted and established in East Cambridge, Massachusetts, operated from 1912 a branch in Montmagny, France, but in 1923 converted the branch into a French *société anonyme*, "Boston Blacking et Cie.," whereupon the mother corporation ceased to pay taxes imposed on foreign business. The courts found nothing factually changed in the carrying on of the business and declared the conversion to be simulated, i.e., fictitious, the American corporation having remained the owner of the business as before.<sup>45</sup> But the courts include the case where central office has been "fraudulently" pretended to exist abroad in order to "evade" the French law of corporation,<sup>46</sup> or in order to create "privileges for certain shareholders."<sup>47</sup> In such instances, it is immaterial whether the organization seriously means to have its seat abroad. The "Moulin Rouge Attraction Inc., Ltd." was incorporated in London for the purpose of carrying on a famous amusement place in Paris. It was established that there was nothing in London except rented premises, while the entire administration was in Paris and all negotiations for the promotion had been contracted and the capital raised in France. The promoters and the first manager were punished for not having complied with the formalities required for French incorporation.<sup>48</sup> In other cases, associations have even been

<sup>43</sup> For particulars, see the commentaries to § 24 of the BGB., and WIELAND, 1 Handelsr. 172; 2 *id.* 78 n. 7.

<sup>44</sup> Cass. (req.) (Nov. 21, 1889) Clunet 1889, 850; for other decisions, see 2 ARMINJON § 188; recently Cass. (req.) (July 17, 1935) S.1936.1.41.

<sup>45</sup> Cass. (civ.) (June 29, 1937) Clunet 1938, 67, 7 Giur. Comp. DIP. § 105.

<sup>46</sup> Cass. (req.) (Dec. 22, 1896) S.1897.1.84, D. 1897.1.159, Clunet 1897, 364; Cour Paris (March 27, 1907) Clunet 1907, 768; for other decisions see SURVILLE 722 n. 2; LIGERPOULOS and AULAGNON, 8 Répert. No. 97.

<sup>47</sup> See LEREBOURS-PIGEONNIÈRE 195 § 163.

<sup>48</sup> Trib. corr. Seine (July 2, 1912) D.1913.2.165, Clunet 1913, 1273.



treated as nonexistent. The courts conducting such investigations inquire into the reasonableness of foreign incorporation. In the case of a company organized to exploit mines in Canada, having its administrative center in France, it was held innocuous that the enterprise was incorporated abroad, after a certain merger of companies, because this facilitated its business. Also the fact that, instead of a company organized under the laws of a Canadian province, an English type was chosen, was approved on account of the interest in preferring the more common British legislation.<sup>49</sup>

In one form or another, the statement that the real, not some nominal or artificial, domicile determines the applicable law, occurs in many statutes and court decisions.<sup>50</sup> To unify the formulation of the Continental principle, the subcommittee draft of the League of Nations for an international treaty on commercial companies (1929) provides, in article 3, that the contracting parties are free "to regard a seat as fictitious and artificial if its connection with the territory . . . is fraudulent and intended to evade imperative provisions of the applicable law or if the real and effective seat is not situated in the country where the company has been formed." Yet the concession made thereby to the French doctrine of *fraude* is questionable. While a "simulated" domicile is no domicile at

<sup>49</sup> Trib. com. Lille (May 21, 1908) D.1910.2.41. In a similar way, central control of a corporation as ground for the imposition of taxes must be "real"; a transfer of the "*siège social*" to a colony is held genuine: Trib. Seine (July 6, 1935) Revue Crit. 1936, 771, or fictitious: Cass. (req.) (July 17, 1935) Revue Crit. 1936, 767; Trib. Seine (Dec. 22, 1938) Revue Crit. 1939, 269.

<sup>50</sup> E.g., Denmark: see 6 Répert. 217.

Egypt: Trib. Mixtes, see ARMINJON, Revue 1908, 772, 865; KEBEDGY, *id.* 1914, 396; App. Mixte d'Alexandrie, Clunet 1930, 767.

Japan: C. Com. art. 258; see comment in 1 C. Com. of Japan Ann. 412.

Switzerland: Fed. Council (Jan. 20, 1875) BBl. 1876 II 2; Eidgen. Amt für das Handelsregister (Nov. 4, 1928) 28 SJZ. 328, 5 Zausl.PR. (1931) 722.

But Liechtenstein, P.G.R. art. 233 allows holding companies with a purely nominal office in the country to receive juristic personality; this is just one of the tricks of this code to attract rich foreign holding companies.

Apparently dissenting, Yugoslavian C. Com. of 1937, art. 501 par. 1, see EISNER, 1 Symmikta Streit (1939) 290.

all, a "fraudulent seat" that is not simulated is real and serious. Whether an association incorporated in a country in which its real headquarters but no other activity is located, is valid, ought to be decided according to the law of this very country, if the principle of central establishment obtains. All that the "evaded" country may reasonably do, is to treat the corporation as foreign and react appropriately against its carrying on business. The French doctrine of fraud, therefore, has deserved criticism in theory as well as in practice, because it introduces a high degree of insecurity into conflicts law.<sup>51</sup> In the great majority of countries, the American view is shared that "it is no fraud or evasion of the laws of a state for its citizens, intending to act only in their own state to form themselves into a corporation under the laws of another state."<sup>52</sup>

### III. EXCEPTIONS

#### I. To the Law of Incorporation

While as a rule, for the purpose of the incorporation principle, the place where a corporation is intended to operate lacks importance, there are exceptions well deserving notice.

One is the case where a state makes it possible for a corporation to be created with the power to do business exclusively outside the state. Such corporations have been held devoid of legal existence, because a state cannot "spawn corporations and send them forth into other states to be nurtured and do business there," when it will not allow them to operate within its own boundaries.<sup>53</sup>

<sup>51</sup> ARMINJON, *Revue Dr. Int. (Bruxelles)* (1902) 408 and *id.* 1927, 393; BEITZKE, *Jur. Personen* 69; and especially TRAVERS, *Recueil* 1930 III 67, 70, 78. VAUGHN WILLIAMS and CHRUSACHI, 49 *Law Q. Rev.* (1933) 348 observe moreover: "It is surely paradoxical that a country should impose its nationality by way of punishment for fraud." Quite so! But this is not a necessary incident of the law of the central office, and the repudiation of the French theory of fraud does not "drive" us "back" to the law of incorporation.

<sup>52</sup> 2 BEALE 775 § 167.4.

<sup>53</sup> *Land Grant R. & T. Co. v. Coffey County* (1870) 6 Kan. 149, 153; see BALLANTINE, *Corporations* 854 n. 16; 2 BEALE § 167.4.

## 46 CORPORATIONS, KINDRED ORGANIZATIONS

By analogous reasoning, the privileges of interstate commerce have been safeguarded against misuse. A corporation chartered in West Virginia but conducting all its contracting and manufacturing operations in Illinois where also all its property was located, was regarded as doing exclusively intra-state business.<sup>54</sup>

The California courts have occasionally argued that, if a corporation does all its business and has all its property in that state, domestic law should be applied rather than that of the state of creation, and they have assumed the situs of the stock of a company to be in the forum for the purposes of an action for issue of shares.<sup>55</sup>

In this connection, we may mention also the usury cases in which courts have refused to recognize an agreement that the law of the corporation's domicil—of the state of incorporation—should govern a contract, if its principal place of business is in another state.<sup>56</sup>

### 2. To the Law of the Central Office

An Italian commercial provision,<sup>57</sup> followed by some other codes,<sup>58</sup> provided that a foreign-created business corporation

<sup>54</sup> *Hump Hairpin Co. v. Emmerson* (1922) 258 U. S. 290.

<sup>55</sup> *Wait v. Kern River Mining, Milling & Dev. Co.* (1909) 157 Cal. 16, 106 Pac. 98. That in analogous cases some courts are more inclined to take jurisdiction on internal affairs of a corporation, contrary to the rule *infra* Chapter 20 n. 53, is another fact.

The American Department of State may refrain from intervening for American-incorporated companies, if all shareholders and the entire business are in the country against which steps should be taken, see 2 HYDE 903.

<sup>56</sup> *Stoddard v. Thomas* (1915) 60 Pa. Super. Ct. 177 (loan by a corporation actually doing business in the District of Columbia, the customer being a resident of Pennsylvania, and the law of Virginia being referred to); *Brierley v. Commercial Credit Co.* (1929) 43 F. (2d) 724 (promise of credit in Maryland to a firm in Pennsylvania, by a firm doing actual business in Baltimore (Md.), the law of Delaware being agreed upon); *U. S. Building and Loan Ass'n v. Lanzarotti* (1929) 47 Ida. 287, 274 Pac. 630.

<sup>57</sup> Italy: C. Com. of 1882, art. 230 par. 4; VIVANTE, 2 Trattato di diritto commerciale § 820; DIENA, 1 Dir. Com. Int. 341; FEDOZZI 71; CAVAGLIERI, Dir. Int. Com. 158.

<sup>58</sup> Portugal: C. Com. (1885) art. 110.

was subject to Italian law, if both its "seat" and its "principal object" were in Italy. This restricted the significance of the central office. Italian law seemed not to apply to a foreign incorporated business enterprise even though the central administration was in Italy, unless the technical activity was centered there. On the other hand, a corporation created in Italy and having its control center there, was always regarded as governed by Italian law, irrespective of the place of manufacturing or trading.

The Argentine Commercial Code,<sup>59</sup> followed by Honduras,<sup>60</sup> probably the Mexican<sup>61</sup> laws, and finally the Rumanian and Italian amended texts<sup>62</sup> declare the internal law always applicable, if *either* the head office (and the general

Rumania: C. Com. (1887) art. 239.

On Argentina's provisions framed on the basis of the Portuguese code, see next note.

<sup>59</sup> Argentina: C. Com. art. 286; ALCORTA, 3 Der. Int. Priv. 154; Cám. 2a App. Córdoba (Nov. 11, 1938) 22 La Ley 126. The restrictive interpretation by ZEBALLOS, Clunet 1906, 613 is overruled.

For example, the "Société du Port de Rosario," subject matter of the decision of the French Cass. (civ.) (July 9, 1930) D.1931.I.14, S.1931.124, would certainly be held in Argentina to be a national company. It was created in France but deployed all its activity as to works, exploitation, and revenues in the Argentine port Rosario, according to a governmental concession. From the French point of view, the Court of Cassation stated that the gold clause stipulated in the bonds of the corporation was to be considered as an international contract, not subject to the French currency laws, but did not declare the company to be Argentine, as VOELKEL, 14 Tul. L. Rev. (1940) at 45 n. 13 assumes.

<sup>60</sup> Honduras: C. Com. (1940) art. 286.

Nicaragua: C. Com. art. 339.

Paraguay: C. Com. art. 286, all these textually following Argentina.

Panama: C. C. art. 82: "associations" having their principal object in Panama are subject to the local law as to the form, validity, and registration of their acts of association; C. Com. (1916) art. 11.

Venezuela: C. Com. (1919) art. 359 (new 334); PÉRES, "Sociedades extranjeras", 25 Revista Der. Jur. y Ciencias Soc. (1936) 50, thinks that the corresponding article 359 of the former code refers to partnerships only and that foreign corporations with their principal establishment in Venezuela are only "domiciled" there.

<sup>61</sup> See SCHUSTER, 7 Tul. L. Rev. (1933) at 376, quoting JORGE VERA ESTAÑO, 382.

<sup>62</sup> Italy: C. C. (1942) art. 2505. What, furthermore, does the new art. 2509 C. C. mean? It says: companies constituted in the territory of the state, even though the object of their activity is abroad, are subject to Italian law. Are they recognized without having their seat in the state, thus adding the principle

meetings of the shareholders, adds Argentina), *or* the principal establishment, or chief object, is situated in the state. Thus, the principle is no longer restrictive when it operates in favor of the law of the forum, but it remains so in reference to foreign law.

A similar provision of the Japanese Commercial Code (article 258) runs as follows:

"A company which establishes its principal office in Japan or the chief object of which is to engage in commercial business in Japan shall, even though formed in a foreign country, comply with the same provisions as a company formed in Japan."<sup>63</sup>

This rule has been explained as intending "to forestall any attempt to establish a fictitious permanent establishment in a foreign country in order to evade the application of Japanese laws."<sup>64</sup>

Also the Treaty of Commerce between Great Britain and Turkey of 1930 in which the seat principle was adopted has been corrected in the final protocol to the effect that foreign companies concentrating their principal operations on Turkish territory, must obtain "Turkish nationality" in order to do so.<sup>65</sup>

For minor political reasons, finally, the German Civil Code declares an exception to its principles, viz., it permits special charters for associations domiciled abroad.<sup>66</sup> This has been

of incorporation to the other grounds for claiming domestic character? Art. 2328, No. 2, in fact, requires a stock corporation only to indicate its seat without mentioning that it should be in the state.

Rumania: C. Com. (1938) art. 354.

<sup>63</sup> Cf. YAMADA, 6 Répert. 540 No. 61.

Similarly, Liechtenstein: P. G. R. art. 233.

<sup>64</sup> 1 C. Com. of Japan Ann. 412 n. 1, see Tokyo District Court (Sept. 10, 1918) *id.* n. 2.

<sup>65</sup> Am. J. Int. Law 1933, Supp. 109 art. 13.

<sup>66</sup> BGB. § 23: see NEUMEYER, 1 Int. Verwaltungs R. 129 and in 2 Mitteilungen dt. Ges. Völker R. (1918) 159; RUNDSTEIN, Report, 22 Am. J. Int. Law 1928, Supp. 186.

applied to German school, church, and relief organizations. It is fully admitted in Germany that this provision pertains to the municipal law rather than to conflicts law and that no extraterritorial effect is expected.<sup>67</sup>

The same should be assumed in regard to provisions of the more recent Italian type which subject foreign-created corporations to all domestic rules for the only reason that their center of exploitation is in the country. Such a rule, perhaps justifiable in itself, lacks reciprocity. A state that regards a corporation as domestic because it has its seat there, should not characterize likewise as domestic one whose seat is abroad. These pretensions recall the artful combinations of principles that are used to extend the domain of territorial law to individuals.

While these unprincipled provisions are frequently confused with the imposition of domestic law upon foreign corporations carrying on business in the country, they seem to have a deeper and more involved bearing. What consequences the Italian courts<sup>68</sup> attach to the modified text of their law are not yet known.

An exception would have to be stated also if the statement of a few French writers were actually law, that a corporation by its charter may fix its "seat" in a country in which it does not have its central administration whenever serious interests warrant this choice<sup>69</sup>. This, however, seems to refer, at most, to some phases of administrative law.

<sup>67</sup> RAAPE 129, 132 VI.

<sup>68</sup> Failure to comply with the provisions of the old Commercial Code was not considered prejudicing recognition. See Cass. (July 13, 1936) *Giur. Ital. Rep.* 1936, 889 Nos. 267-270; *Foro Ital. Rep.* 1936, 1751 No. 556; App. Milano (May 7, 1937) *Giur. Ital.* 1938, 870 No. 352; App. Torino (Jan. 7, 1936) *Foro Ital.* 1936 I 397.

<sup>69</sup> DEMOGUE, Note in S.1908.2.177; PERCEROU, Note in D.1910.2.41 and in *Annales de Droit Commercial* 1926, 5 n. 1; SURVILLE 724; SOLUS, Note, S.1933.2.49; LEREBOURS-PIGEONNIÈRE 195. Cf. KESSLER, 3 *Zausl.PR.* (1929) 766; GUTZWILLER, 12 *Mitteilungen dt. Ges. Völker R.* (1933) 182; BEITZKE, *Jur. Personen* 89.

## IV. RENVOI

Important modifications, not so much of principle as of its results, follow from renvoi. The "Eskimo Pie Co." was incorporated in Delaware and, by American standards, recognized in Kentucky where the main establishment was located. For this reason the German Reichsgericht, too, recognized the incorporation.<sup>70</sup> We should assume that whenever incorporation and main office are situated in different states both of which follow the principle of incorporation, the legal personality is to be recognized in any country of the opposite system, provided that renvoi is not rejected.

But the converse is true, too. If an anonymous company is formed in France with control actually centered in Brazil, French and Brazilian courts agree in applying Brazilian law to the problems of the existence and capacity of the organization. Failure to create a company in Brazil causes nullity or nonexistence in both countries. There is no reason why an American court should insist on qualifying such company as a valid French entity. The principle of incorporation furnishes the convenient answer, if it is considered that the incorporation has been ineffective in France and missing in Brazil.

V. TRANSFER OF CENTRAL ADMINISTRATION  
TO ANOTHER COUNTRY

## I. Law of Central Control

The most critical aspect of the system based upon the central management rather than upon the mere fact of incorporation, develops when it is desired to transfer the main office from the state of incorporation to another state.<sup>71</sup> Such

<sup>70</sup> RG. (June 3, 1927) 117 RGZ. 215; cf. RAAPE 131 § 6.

<sup>71</sup> For literature see WIELAND, 43 Z. Schweiz. R. (N. F.) 268; PERROUD, *Clunet* 1926, 561; HAMEL, 2 Z. ausl. PR. (1928) 1002; BEITZKE, *Jur. Personen* § 19; 2 STREIT-VALLINDAS 88. On the controversy respecting the effects on nationality, see CAVAGLIERI, *Dir. Int. Com.* 233 and authors cited; *Código Bustamante*, art. 20 par. 1.

happening logically should destroy the legal entity; at the new place a new one would have to be built up. This, however, makes necessary winding up of the corporation, difficult legal operations and huge losses, taxes, and charges in both countries, so as to render the undertaking an arduous affair. For the purpose of saving all that, may the charter be modified? And may an incorporated association do so, without losing its capacity or even being automatically dissolved?

These and kindred questions have been the topic of abundant controversy from the viewpoint of the country from which the corporation emigrates. Prevailing French doctrine allows the stockholders to decide in an extraordinary general meeting by unanimous resolution to transfer the *siège social* abroad, without dissolving the juristic person.<sup>72</sup> It is doubtful whether a clause in the by-laws, which has become regular in France, permitting the board of directors to change the seat, is a valid delegation of power,<sup>73</sup> particularly if the seat should be transferred to a foreign country. To the opposite effect, in the dominant German opinion a decision of the corporate organs to transfer the seat to a foreign country, automatically causes the dissolution and liquidation of the corporation.<sup>74</sup> In Switzerland<sup>75</sup> and elsewhere<sup>76</sup> the problem is unsolved.

<sup>72</sup> Cass. (civ.) (Nov. 26, 1894) S.1895.1.133, Clunet 1895, 117; Cass. (req.) (March 29, 1898) D.1899.1.595, S. 1901.1.69, Clunet 1898, 756; Trib. com. Seine (May 15, 1925) Revue 1926, 27; PERROUD, *id.* 567; *cf.* LEREBOURS-PIGEONNIÈRE § 165. COSTE-FLORET, "Le transfer du siège social," 1 Revue générale de droit commercial (1938) 577, 590, asserts that a two-thirds majority suffices.

<sup>73</sup> For nullity, Cour Paris (Nov. 27, 1931) Gaz. Pal. 1932.1.189 and COSTE-FLORET, *id.* 591.

<sup>74</sup> German RG. (June 5, 1882) 7 RGZ. 68, 70; RG. (June 29, 1923) 107 RGZ. 94; STAUB-PINNER in 2 Staub 787 § 292 n. 20; FLECHTHEIM in 3 Düringer-Hachenburg I 283 § 182 n. 45. Mining corporations by transfer enter into liquidation, 88 RGZ. 53.

Austria: OGH. (Jan. 13, 1920) 4 Bull. Inst. Int. (1921) 89 n. 743.

Italy: ANZILOTTI 124; CAVAGLIERI, Dir. Int. Com. § 22.

<sup>75</sup> See STAUFFER, 7 Gmür art. 14 No. 106; SIEGWART, in 5 Zürcher Kommentar zum Schweiz. ZGB. Einleitung No. 365.



Some countries, on the other hand, into which an existing foreign-constituted company wants to move have shown readiness to receive it without change of personality. Some decrees of Brazil have provided that an anonymous stock company which transfers its seat to Brazil and obtains governmental authorization to carry on business is considered a national.<sup>77</sup> In recent times, this method has been used by states seeking to attract large holding companies. Normal principles are set aside. Even Swiss legislation, generally a model of correctness in international relations, has allowed foreign stock corporations to register as Swiss anonymous stock companies with central offices there, on special authorization by the Federal Council under greatly facilitated conditions of incorporation.<sup>78</sup> The entity petitioning has to prove that it is a legally constituted stock company under the law of its foreign headquarters.<sup>79</sup> This means that it must have existed and not have been dissolved at the time of its reincorporation and transfer of its domicile, notwithstanding the fact that this may cause dissolution in the home state.

A number of small states went much further, making great concessions as respects incorporation fees and current taxation.<sup>80</sup>

It would appear that if the personal law of the corporation prohibits exportation of the management without dissolution and winding up, or requires a unanimous decision or a governmental authorization (as Liechtenstein does for its own

<sup>76</sup> E.g., Belgium: *Novelles Belges*, 3 D. Com. No. 5214 denies the possibility of transfer without destroying personality; but most lawyers follow the French literature.

<sup>77</sup> Brazil: Cf. BEVILAQUA 223; CARVALHO DE MENDONÇA, 3 *Trat. Dir. Com.* § 624 (c). Companies authorized to do business in Brazil may transfer their seat to Brazil according to Decree-Law No. 2627 of Sept. 26, 1940, art. 71.

<sup>78</sup> Swiss Rev. Code of Obligations (final provisions) art. 14 par. 1. Cf. SAUSER-HALL, *Le transfert des sociétés anonymes de l'étranger en Suisse* (1938).

<sup>79</sup> Same code, art. 14 par. 2.

<sup>80</sup> E.g., Liechtenstein, P.G.R. art. 234: the seat may be transferred to Liechtenstein, on authorization by the court, without dissolution abroad and without bringing business or administration into the country.

corporations), consistency demands that these provisions should be respected in other countries. Yet, it seems that nobody cares for such application of the personal law. A company, thus, may be dead in its former state and continue to live in another state, although the same principle of the place of central control governs in both states.

Finally, the occupation of various countries by the enemy during the second World War has brought new necessities. Noteworthy are the emergency decrees of the governments in exile of the Netherlands, Belgium, and Luxemburg.<sup>81</sup> In particular the Belgian decree-laws allowed a business company to transfer its *siège social* to a foreign country without losing its nationality; they further provided that such transfers may be effected by a simple decision of the administrative organ of the company, i.e., by a majority vote of a general meeting of the stockholders or of the board of administration.<sup>82</sup> By virtue of the first provision, the personal law of the company is upheld and the company is treated by the Belgian courts and authorities as a national. This obviates the requirement that the central control should be exercised in Belgium. It is not demanded that a new place of control be established at any place of business abroad. Since, on the other hand, the existence of an actual central office is of no importance in the United States, a Belgian corporation or partnership having taken refuge in this country, without being reincorporated, is to be considered a foreign organization, subject to Belgian law. Of course, a Belgian corporation whose domicil had been moved to New York, by resolution of the board of directors in June 1940, was considered entitled to sue in court as a resident.<sup>83</sup>

<sup>81</sup> The dates are recorded by DOMKE, *Trading with the Enemy in World War II* (1943) 172, cf. *id.* 345; HANNA, "Nationality and War Claims," 45 Col. L. Rev. (1945) 301, 340.

<sup>82</sup> Belgian Decree-Law of February 2, 1940, with the other decree-laws repealed by art. 8 of the Decree-Law of February 19, 1942, *Moniteur Belge* (London, March 31, 1942) 174, 182.

<sup>83</sup> *Chemacid S. A. v. Ferrotar Corporation* (D.C. S. D. N. Y. 1943) 51 F.

Contrary provisions of the charter or by-laws concerning the domicil of the company were repealed, as provided also in a Swiss emergency decree allowing juristic persons to change domicil within the country.<sup>84</sup> The Dutch decree made the transfer of domicil from the mother country to another country a matter of governmental decision.<sup>85</sup>

## 2. Law of Incorporation

Continental writers usually believe that at common law, in a system based merely upon incorporation, no difficulty can arise if the central office is removed from the country of incorporation to another country.<sup>86</sup> English authors have confirmed this view and seem to rejoice over this proof of superiority.<sup>87</sup>

Now, it is quite true that, since the place of the headquarters is immaterial, it may be transferred at will. The Egyptian Delta Land & Investment Company, Limited, incorporated in London in 1904, could be from 1907 on "controlled, managed, directed, and carried on entirely in Cairo," released from its English liability for income tax<sup>88</sup> without losing its personality. This cannot be done under the principle connecting a juristic person with a state by its place of control, and the case certainly contrasts with that of the Tramways d'Alexandrie, a stock company incorporated and domiciled

Supp. 756; see also *Rembours en Industriebank N. V. v. First Nat'l Bank of Boston* (D. C. D. Mass.) C. C. H. War Law Service, Statutes, par. 9155, cited by HANNA, *supra* n. 81, at 342 n. 79.

<sup>84</sup> Swiss Federal Council (Oct. 30, 1939) 55 Eidgenössische Gesetzsammlung (1939) 1301.

<sup>85</sup> Decree of March 4, 1942, Staatblad van het Koninkrijk der Nederlanden, No. C16.

<sup>86</sup> See e.g., GEILER, 12 Mitteilungen dt. Ges. Völker R. (1933) 180.

<sup>87</sup> VAUGHAN WILLIAMS and CHRUSACHI, 49 Law Q. Rev. (1933) at 346.

<sup>88</sup> [1929] A.C.1. Attorney General v. The Jewish Colonization Ass'n (1900) 2 Q. B. 556; [1901] 1 K. B. 123, C. A. per Smith, M. R., at 130: "The fact that there was a council of administration which carried on the business of the company outside of England does not render the company any less an English company and subject to English law." *Gasque v. Inland Revenue Commissioners* [1940] 2 K. B. 80.

in Brussels whose annulment was sought in the Belgian courts because more of its management was carried on in Egypt than the by-laws justified; the existence of the company was only saved by the argument in the lower tribunal that the stockholders had not unanimously decided to transfer the *siège social*, and in the court of appeal by the reasoning that the facts did not establish such transfer.<sup>89</sup>

Where, however, it is desired to change the personal law, for instance, in order to escape a feared revolutionary legislation, or to change "nationality," in order to establish the right to diplomatic protection or to alter the basis for taxation (otherwise than for English income tax in the opinion of the House of Lords), Anglo-American conceptions do not open any way for maintaining the entity and avoiding winding up. Since, by the old orthodox idea, a corporation can have no legal existence outside the incorporating state, it "has no domicile in the jurisdiction which created it, and as a consequence it has not a domicile anywhere else";<sup>90</sup> "it cannot migrate to another sovereignty."<sup>91</sup> In theory, there does not even seem to exist any doubt that a corporation is unable to change its personal law, or "quasi nationality," without winding up and new creation, although in practice ingenious ways may be found to transfer an undertaking to a newly created foreign company.<sup>92</sup> The question is entirely different from that of change of nationality by a continued corporation in the

<sup>89</sup> Trib. com. Bruxelles (Dec. 8, 1925) and App. Bruxelles (January 13, 1928) Jur. Com. Brux. 1928, 28 and 38.

<sup>90</sup> Mr. Justice Holmes in *Bergner & Engel Brewing Co. v. Dreyfus* (1898) 172 Mass. 154, 158, 51 N. E. 531, 532; 1 BEALE 228 § 41.1: "It can never acquire any other domicile."

<sup>91</sup> 20 C. J. S. 12, Corporations § 1788 n. 24.

<sup>92</sup> In *In re Aramayo Francke Mines, Ltd.* [1917] 1 Ch. 451-C. A., Clunet 1919, 1126, a mining company incorporated in England but carrying on business in Bolivia, with a majority of Bolivian stockholders, attempted to avoid the English war income taxes by a scheme described as follows: a new company was created in Geneva, Switzerland, to which the assets and the undertaking were to be transferred "upon the basis of an exchange of shares of equal values and the assumption by the Swiss company of the liabilities and engage-

case where the territory of its domicil is ceded to or annexed by another power.<sup>93</sup>

## VI. THEORY OF CONTROL

The two dominant theories determining the status of corporations agree in disregarding any qualification of the directors or members of the association as well as the places where the capital funds are sought or supplied.<sup>94</sup> For example, where all members of a company founded in Chile are United States citizens, the company is not regarded a citizen for the purposes of federal jurisdiction on the ground of diverse citizenship.<sup>95</sup> In the words of Mr. Justice Stone:

"For almost a century, in ascertaining whether there is the requisite diversity of citizenship to confer jurisdiction on the federal courts, we have looked to the domicile of the corporation, not that of its individual stockholders, as controlling."<sup>96</sup>

Also in England before the first World War, it was a commonplace that nationality of a company, whatever it may signify, is independent of the nationality of the participants.<sup>97</sup>

ments of this company" (i.e., *Aramayo*), see *Cozens-Hardy*, M. R., at 473, *Warrington*, L. J., at 475. The opinions were not concerned with any other problem than the political danger of the company's coming under Swiss control during the war.

FARNSWORTH, *The Residence and Domicil of Corporations* (1939) 217-222, 231, 234 contends that a corporation under Anglo-American law can acquire a domicil of choice in theory but not in law,—words which do not convey what they should.

<sup>93</sup> See MOORE, 3 Digest 804 § 485; TRAVERS, *Recueil* 1930 III 106; see also KAHN-FREUND in *Annual Survey of English Law* (1939) 374.

<sup>94</sup> ARMINJON, 2 *Précis* §§ 185ff. and most European writers.

<sup>95</sup> See cases in 35 C. J. S. 818 § 21 n. 11.

<sup>96</sup> *Puerto Rico v. Russell & Co.* (1933) 288 U. S. 476. And see as to claims of American corporations in claims agreements "for an unbroken history of one hundred and forty years," the opinion of Professor Edwin M. Borchard of March 11, 1925, in *Mixed Claims Commission, United States and Germany*, Final Report of H. H. MARTIN (1941) 41.

<sup>97</sup> Usually based on *Driefontein Cons. Gold Mines v. Janson, Ltd.* (1900) 2 Q. B. 339, [1901] 2 K. B. 419, [1902] A. C. 484; *Central India Mining Co. v. Société Coloniale Anversoise* [1920] 1 K. B. 753, 762.

The same attitude was emphasized by neutral nations during the war of 1914-1918, for instance by the government of Brazil when declaring neutrality in 1915.<sup>98</sup>

*War seizures and restrictions.* During the first World War, however, English courts, headed by the House of Lords,<sup>99</sup> defined enemy corporations by a new concept which soon was emulated in the war legislation of many belligerent countries, and finally was sanctioned in the provisions of the Peace Treaties of 1919 dealing with liquidation of enemy property.<sup>100</sup> The essential element of the innovation was that a corporation was considered to have enemy character, if it was "controlled" by enemies, that is, was under the dominating or prevailing influence of physical or juristic persons who themselves were qualified as enemy aliens. The United States stayed distinctly aloof from this encroachment upon the traditional theory.<sup>101</sup>

*Mixed arbitral tribunals.* The courts instituted in conformity with the Peace Treaties had to apply the aforementioned provisions based on the new control theory. They had, moreover, to deal judicially with prewar debts submitted to

<sup>98</sup> Brazil: Ministry of Foreign Affairs, Circular No. 1 of Feb. 22, 1915; cf. CARVALHO DE MENDONÇA, 4 *Trat. Dir. Com.* §§ 1513-14.

<sup>99</sup> *Continental Tyre Co. v. Daimler* [1916] 2 A. C. 307, in matters of trading with the enemy. The notions established in the decision were in reality new. The *Hamborn* [1919] 2 A. C. 993 (extending the rule to a Dutch company and liability to condemnation in prize). See PARRY, "The Trading with the Enemy Act and the Definition of an Enemy," 4 *Modern L. Rev.* (1941) 161, 167; MENDELSSOHN BARTHOLDY, "Der Kriegsbegriff des Englischen Rechts," 8 *Rheinische Z. f. Zivil- und Prozessrecht* 357; cf. GARNER, 1 *International Law and the World War* (1920) 217. It was much noticed, moreover, that the Lords spoke of the concept of enemy, and not of that of nationality, see VAUGHAN WILLIAMS and CHRUSSACHI, 49 *Law Q. Rev.* (1933) 338.

<sup>100</sup> *Treaties of Versailles* (with Germany) art. 297 (b); of *St. Germain* (with Austria) art. 249 (b); of *Neuilly* (with Bulgaria) art. 177; of *Trianon* (with Hungary) art. 232 (b). Cf. R. FUCHS, "Die Grundsätze des Versailler Vertrages über die Liquidation und Beschlagnahme deutschen Privatvermögens im Auslande" (1927) in 6 *LESKE-LOEWENFELD* II 90.

<sup>101</sup> The *Trading with the Enemy Act*, 40 Stat. I 411, § 2; in introducing the Bill to Congress, the Attorney General of the United States said, "We have specifically abstained in the bill from attempting to go behind the corporate

clearing proceedings, of which each allied or associated power could avail itself. Since England, France, and Italy each elected this procedure in relation to Germany, prewar debts and claims between English, French, and Italian nationals, on the one hand, and German nationals, on the other, had to be entered into the clearing (Versailles Treaty, article 296). Moreover, prewar contracts between nationals of countries which had been enemies formed the object of a special jurisdiction of the mixed arbitral tribunals (Versailles Treaty, article 304).

With the usual confusion of problems, the attempt was made to transfer the criterion of control to the application of these two articles. It was a point of great practical importance. Incidentally to the procedure of clearing, Germany was liable as guarantor for prewar debts of a German company on a fixed high exchange rate. It was contended that the guaranty extended to an English incorporated company controlled by Germans and liquidated by England. After an initial period of divided opinions,<sup>102</sup> the various mixed arbitral tribunals commonly acknowledged that, under the peace provisions not expressly resorting to the device of control, nationality was to be construed in accordance with the familiar devices of in-

character." *Behn, Meyer & Co. v. Miller* (1925) 266 U. S. 457; *Hamburg-American Line Terminal and Navigation Co. v. United States* (1928) 277 U. S. 138. Mr. Justice Reynolds stated that Congress definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy (at 140); *Fritz Schulz Jr. Co. v. Raimés & Co.* (1917) 100 N. Y. Misc. 697, 166 N. Y. Supp. 567.

On the sharp rejection of the control theory in Switzerland see SAUSER HALL, 50 Bull. Soc. Législ. Comp. (1921) 237 n. 4.

<sup>102</sup> The Franco-German Mixed Arb. Trib. went to the most advanced applications of the "control" theory in the much discussed decisions, *Société du Chemin de Fer de Damas-Hamah v. Cie. du Chemin de Fer de Bagdad* (Aug. 31, 1921) 1 Recueil trib. arb. mixtes 401, Clunet 1923, 595; *Soc. An. du Charbonnage Frédéric-Henri v. État Allemand* (Sept. 30, 1921) 1 Recueil trib. arb. mixtes 422, Clunet 1923, 600; and other cases. See VAUGHAN WILLIAMS and CHRUSSACHI, 49 Law Q. Rev. (1933) 340.

corporation or head office, without regard to the nationality of the shareholders or directors.<sup>103</sup>

*Postwar controversy in France.* The excitement stirred up by this dispute and the memory of the war emergency law in France, resulted in a tendency to adopt control as the general criterion of "nationality," including for the purposes of choice of law. A corporation should, in every respect, be ascribed to the country whose nationals exercise preponderant influence on the business administration.<sup>104</sup> Niboyet, the leader of this movement, proposed an appropriate system.<sup>105</sup> When a committee of bondholders of a Rumanian corporation, in order to sue the corporation in France, formed an association in Paris in accordance with the French law of 1901 on associations, the Tribunal de la Seine held that the association could not sue, because the members were not Frenchmen. This decision is recognized as absurd.<sup>106</sup>

<sup>103</sup> Anglo-German Mixed Arb. Trib., Chamberlain & Hookham v. Solar Zählerwerke G. m. b. H. (Dec. 12, 1921) 1 Recueil trib. arb. mixtes 722; Gebr. Adt. A. G. v. Scottish Co-op. Wholesale Soc. Ltd. (Nov. 30, 1927) 7 Recueil trib. arb. mixtes 473. Anglo-Bulgarian Mixed Arb. Trib., Dawson & Son v. Balkanische Handels- & Industrie-A. G. (October 10, 1923) 3 Recueil trib. arb. mixtes 534; Anglo-Hungarian Mixed Arb. Trib., Investment Registry, Ltd. v. United Temes and Somogy County Local Railways, Ltd. (Feb. 24, 1925) 5 Recueil trib. arb. mixtes 48—all adopting the double criterion of constitution *plus seat*; the British agent in the second case even urged the German seat, while the German agent stressed the center of economic activities. Similarly, Germano-Belge Mixed Arb. Trib., Soc. de Transports Fluviaux en Orient v. Soc. Impériale Ottomane du Chemin de Fer de Bagdad (Dec. 10, 1929) 9 Recueil trib. arb. mixtes 664, Annual Digest 1929-30, 248 case 151. Belgo-German Mixed Arb. Trib., La Suèdoise Grammont v. Roller (October 16, 1923) 3 Recueil trib. arb. mixtes 570. Italo-German Mixed Arb. Trib., Fratelli Giuliani v. État Allemand (April 29, 1924) 4 Recueil trib. arb. mixtes 506; for other cases see VAUGHAN WILLIAMS and CHRUSACHI, *supra* n. 99, 341, FELLER, 2 Z.ausl.öff.R. (1931) II 55.

<sup>104</sup> App. Colmar (Oct. 29, 1925) S.1927.2.33 (on *cautio iudicatum solvi*) and (Feb. 28, 1923) Revue juridique d'Alsace et de Lorraine 1923, 438 (on valorization) concerned matters of foreigners' condition, but were styled and cited in a general way.

<sup>105</sup> NIBOYET in many utterances, see especially Manuel No. 304 and Revue Crit. 1934, 114.

<sup>106</sup> Trib. Seine (April 30, 1932) S.1932.2.174 (as of April 20, 1932) Gaz. Pal. 1932.2.217; see criticism by STEFANI and ANDRIOLI, 2 Giur. Comp. DIP. (1933) 22 No. 10.



Once more, the administrative authorities and the courts returned to the previous views.<sup>107</sup> As early as 1926, the French Minister of Justice stated that it was "now generally assumed that the nationality of a company is determined by the place of its true and effective center, viz., the place where its administration is actually managed and centralized."<sup>108</sup> The bilateral international treaties of establishment were reassumed on the old footing.

These discussions, nevertheless, were not forgotten. With the new war approaching, French measures of precaution against foreign-domiciled corporations extended to a wide range of foreign-controlled organizations domiciled in France. Conflicts law was directly affected by a French decree of April 12, 1939, declaring that foreign associations with non-profit purposes required recognition by decree, and that the term, foreign, includes "groups presenting the characteristics of an association that have their *siège social* abroad, or groups having their center in France, are in fact directed by foreigners, or have either foreign managers or at least twenty-five per cent foreign members."<sup>109</sup>

With this exception, it can be stated that in the field of conflicts law the control theory was completely rejected by all countries. As a matter of fact, the theory has proved time and again impracticable and unjust in reference to subsidiary corporations and otherwise.<sup>110</sup> Even its discriminatory application against enemy property has inspired many crude solu-

<sup>107</sup> Cass. (req.) (May 12, 1931) S.1932.1.57, D.1936.1.121; cf. Revue Crit. 1934, 109; 1938, 340. Cass. (req.) (Jan. 9, 1940) Nouv. Revue 1940, 202: given under public law, a partnership (being a legal person in France) constituted and having its seat in France is of "French nationality," irrespective of the nationality of its members.

<sup>108</sup> Answer by the Garde du Sceaux, Journal Officiel of February 5, 1926, see Clunet 1926, 534.

<sup>109</sup> See SAVATIER, "Sur la condition des personnes morales en DIP. dans les divers décrets-lois français de 1939", Revue Crit. 1939, 418.

<sup>110</sup> See SAUSER-HALL, Les Traités de Paix et les droits des neutres (1924) 117; R. FUCHS, *op. cit. supra*, n. 100 and cited authors. See also VAUGHAN WILLIAMS and CHRUSSACHI, 49 Law Q. Rev. (1933) 347: "It is inconceivable

tions, as for instance in the case of companies incorporated and administered in neutral countries, which were forcibly liquidated in an Allied country to the detriment of the neutral members.<sup>111</sup> The virtual agreement reached between the wars in all formerly belligerent countries, is remarkable. During the present conflagration, of course, practically all belligerent countries have enlarged the concept of enemy for the purpose of trading with the enemy prohibitions, freezing and sequestration of enemy assets, and in this connection have combined all three theories of incorporation, seat, and control so that each one of these criteria stigmatizes a corporation as enemy.<sup>112</sup> In economic warfare, the economic connections cannot be disregarded.

Likewise, although not fitted for determining the personal law, the theory of control could reasonably be employed so as to entitle only French-dominated companies to enjoy compensation for war damages in France.<sup>113</sup> It was a sign of continued confusion that this decision was hailed by the advocates of the control theory as a "turning point" in the development of the concept of foreign incorporation.<sup>114</sup>

Questionable, however, were decisions of the French Court of Cassation denying protection to so-called "commercial property," i.e., the rights arising out of a long-time lease of business premises under the Law of June 30, 1926, to French firms controlled by the American corporations, Remington and Singer.<sup>115</sup>

that one country should have the right to create a person which is to be a national of another country."

<sup>111</sup> See against this encroachment the decision of the Swiss Federal Court (April 1, 1924) 50 BGE. II 51; Note, SAUSER-HALL, *Clunet* 1924, 785; Note, NIBOYET, S.1925.1.225.

<sup>112</sup> For the various methods used, see DOMKE, *Trading with the Enemy in World War II* (1943) 120-144.

<sup>113</sup> Cass. (civ.) (July 25, 1933) D.1936.1.128; and again Cass. (civ.) (May 29, 1937) *Clunet* 1938, 89.

<sup>114</sup> DE GALLAIX, *Nouv. Revue* 1936, 485, 498; and in *International Law Association, Report 39th Conference 1936* (1937) 65.

<sup>115</sup> App. Rennes (June 16, 1930) D.1931.2.9, *Annual Digest* 1930, 251

Finally, although diplomatic protection, with discretionary consideration of all elements, may be granted to nationals interested in a corporation,<sup>116</sup> intervention on behalf of a corporation as being controlled by nationals is opposed by a strong opinion.<sup>117</sup>

In conclusion, the criterion of control is entirely inconvenient for determining the personal law, although it may be suitable for discriminating in exceptional administrative measures against certain groups of companies. But to advocate this test generally for all purposes excepting conflicts law, as the Peruvian Delegation has proposed to the Pan-American Union,<sup>118</sup> is a very doubtful generalization.

## VII. RATIONALE

The characteristic of the Anglo-American principle has appeared to consist in the recognition of the law of any state of incorporation, whereas the opposing principle recognizes the law only of that state where a corporation has been created and is domiciled in fact. The conceptual difference between the two systems would be somewhat lessened if the dogma that the domicile is necessarily in the state of incorporation, were to be taken seriously in Anglo-American law. Although this idea has never been employed in selecting the personal law, it does concern private international law that, by another traditional rule, meetings of the members of a corporation can be held only in the state of incorporation, a rule adopted

No. 153 (half concealing the name of the mother company which is, however, the Singer Manufacturing Co. of Elizabeth Port, N. J.); Cass. (req.) (May 12, 1931) S.1932.1.57, D.1936.1.121. NIBOYET, 2 *Traité* 377 § 837 approves the latter decision.

<sup>116</sup> See BORCHARD, *Annuaire* 1931, I 297-313; DE VISSCHER in *Revue Dr. Int. (Bruxelles)* (1936) 481.

<sup>117</sup> Cf. as to Latin America, *supra* pp. 24-27.

<sup>118</sup> Octava Conferencia, Lima 1938, *Diario de Sesiones, Projecto* at p. 618 arts. 3-5. The motion was developed upon the Commission of Jurists, see *id.* 1039.

in the Restatement (§ 163), "unless otherwise provided by the law of the state of incorporation." The New York Annotations to the Restatement recall the former rigid Ormsby Rule,<sup>119</sup> whereby neither shareholders nor directors were allowed to make binding acts outside of the jurisdiction. It would be no great step from this to a rule prescribing that unless the "seat" is situated within the state, incorporation is refused. This is a natural feature of the continental system,<sup>120</sup> but would easily be reconciled with the Anglo-American principles.

However, the contrast of principles is felt in three practical differences:

(a) In the first instance, the common law principle leaves the promoters of a corporation free to choose any country for creating the legal person, and any other country for controlling the administration. The opinions evidently are radically divided on the desirability of this freedom, which is refused in the Continental system. Before the first World War, English business used the corporation law of the Isle of Guernsey, which use was regarded so improper that it was abolished by a clause of the Companies Act of 1929.<sup>121</sup> In this country Delaware for a time became a Mecca for corporations, more recently sharing its popularity with New York, New Jersey, and certain other states. Delaware is still famous for the elaborate care with which the law is currently kept in line with newly occurring needs, and for the special experience of the judiciary. Boards of directors in Delaware companies find their interest in efficient management better safe-

<sup>119</sup> *Ormsby v. Vt. Copper Min. Co.* (1874) 56 N. Y. 623. See also *Stabler v. El Dora Oil Co.* (1915) 27 Cal. App. 516, 150 Pac. 643; HENDERSON 189.

<sup>120</sup> E.g., Germany: *Aktiengesetz*, Jan. 30, 1937, § 5.

Switzerland: See SCHNITZER, *Handelsr.* 80.

Venezuela: C. Com. arts. 209, 219-220, as interpreted by CRAWFORD, 12 Tul. L. Rev. (1938) 212.

<sup>121</sup> Companies Act, 1929, s. 353 subjects those companies to English law.

guarded from interference by small groups of outsiders, which does not necessarily mean undue disregard of various minority interests. The opinions of the experts, however, are strongly divided. There are a good many lawyers in this country who think that a corporation should be created at the place of its principal activity and not be entitled to seek out a law thought more favorable with regard to powers, liabilities, audits, or publicity. Also, in states having modern corporation laws, such as Michigan, the opinion prevails that foreign incorporation for domestic enterprises should be sought only if special reasons make it advisable, such as exceptional needs not satisfied by certain provisions on preferred stock. Considerations of taxation seem no longer to exercise a controlling influence on the choice of the charter state. As mentioned above, the tendency is even stronger to recognize a rival claim of the state of the actual management to control all intangibles and revenues.<sup>122</sup> The traditional principle, thus, is weakened, and its competition with other ideas promotes confusion.

No such doubts exist with regard to the competition of Liechtenstein, Luxemburg, Monaco, and Panama in offering lowest bids for holding companies. They, indeed, provoke the thought of "corporation Renos."

(b) Second, the Continental principle makes it very difficult to transfer a corporation as an existing legal person to another country. Since this weakness can easily be remedied by legislation, the point is insufficient for a decisive criticism. It is entirely impossible, on the other hand, to change the personal law of a company incorporated in England or in the United States.

(c) Third, the principle of incorporation causes puzzling problems in the case where an association is incorporating in several states. The original doctrine concerning the effect of

<sup>122</sup> *Supra* Chapter 18 p. 29.

multiple incorporation was loaded with inconveniences,<sup>123</sup> "defying the common understanding of the business world."<sup>124</sup> Some improvement was effected by recognizing that the legal person created and re-created is the same; the corresponding conclusions were reached, for instance, that the creation of shares is governed by the law of the first incorporation.<sup>125</sup> But a more radical reform would be desirable, and in fact Henderson has urged that the law of the state of incorporation where the headquarters are situated be adopted for all manifestations of an identical corporation.<sup>126</sup>

This suggestion, fostering a link between the two principles, would seem highly significant. But thus far, the international situation is quite similar to that in regard to the two great principles respecting status. Such eminent experts as Young in England and Henderson in the United States have regretted the common law principle as it stands;<sup>127</sup> more recently the following words were exchanged in a meeting of the International Law Association:

*"Mr. Wyndham A. Bewes:* The nationality of a company registered in England is a fiction invented by English law, the nationality itself to start with being a related fiction. If you want to go to the realities of things, the existence of a living company, you have to go to where that company is administered. I think our law is wrong and I should like to see it changed.

*"Mr. President:* I thank Mr. Wyndham Bewes. It is one of the very rare occasions upon which I have heard an eminent English lawyer say that the law of England is wrong."<sup>128</sup>

Nevertheless, a minority of Continental writers advocate

<sup>123</sup> FOLEY, "Incorporation, Multiple Incorporation and the Conflict of Laws,"

<sup>124</sup> Harv. L. Rev. (1929) 516.

<sup>125</sup> HENDERSON 193, *cf.* 69.

<sup>126</sup> Restatement §§ 203, 205.

<sup>127</sup> HENDERSON 191ff.

<sup>128</sup> YOUNG 161, 167, 207; HENDERSON *ibid.*

<sup>129</sup> International Law Association, Report of the 39th Conference 1936 (1937) 85.

just the Anglo-American principle!<sup>129</sup> The majority of lawyers on both sides seem perfectly satisfied with the wisdom of their respective principles.<sup>130</sup>

Again, international attempts at unification<sup>131</sup> have failed.<sup>132</sup> This was also the fate of the notable draft of a uniform state law concerning foreign corporations (1934).<sup>133</sup>

The simple measure suggested above of prescribing in the local requirements for incorporation, that the central office should be in the state, would leave the conflicts law intact and could be followed by those states which have no ambition to create corporations for foreign consumption. There should be no doubt in theory that this is the soundest solution. Likewise in theory, it would seem obvious that the Continental conflicts principle is the true equivalent to the common law principle with respect to individuals, and that this domiciliary rule has as much to recommend it for corporations as it has for individuals. In a federation, the nation-wide activities of a private legal person should be supervised and guaranteed by a federal organ. This is true for intrastate as well as for interstate activity, but, as things stand, the states are thoroughly disinclined to cede one of their last important powers, and the corporations cannot afford to have their

<sup>129</sup> France: PILLET, *Personnes Morales* § 137; WEISS, 2 *Traité* 392.

Germany: 1 FRANKENSTEIN 459; GEILER in 12 *Mitteilungen dt. Ges. Völker R.* (1933) 179 and in *Düringer-Hachenburg* 51; NUSSBAUM, *D. IPR.* 185; SCHWANDT in *Landesreferate, Sonderheft*, 6 *Z.ausl.PR.* (1932) 206.

Italy: ANZILOTTI, 6 *Rivista* (1912) 109, 113.

Switzerland: VON STEIGER, *ZBJV.* 1931, 306 (but without such criticism in his address, *Schweizerische Vereinigung für internationales Recht* No. 27, p. 28).

<sup>130</sup> See the characteristic opposition of views, on the one hand, of D'AMELIO, *Clunet* 1917, 1227, and on the other, of VAUGHAN WILLIAMS and CHRUSSACHI, 49 *Law Q. Rev.* (1933) 343, 347, 348 who accuse the "seat" principle of "inconceivable" pretension and "glaring inconsistencies."

<sup>131</sup> See Report, RUNDSTEIN, *Am. J. Int. Law* 1928, Supp. 187; LEPAULLE, *De la condition des sociétés étrangères aux Etats-Unis d'Amerique* (1923) 74.

<sup>132</sup> The Sixth Hague Conference (1928) found no time for the problem.

<sup>133</sup> Uniform Foreign Corporation Act, in *Handbook of the National Conference of Commissioners on Uniform State Laws* (1934) 286.

vast bureaucratic duties increased by additional federal impositions. Thus, in this country, the main problem lies in other considerations, the most important of which is concerned with the right of doing business, which will be discussed at a later place in this book.



## CHAPTER 20

# The Scope of the Personal Law of Corporations

THE personal law governs all matters relating to a corporation's existence, its functions as defined by its constitution, its organization, liabilities, and termination, as well as connected matters.<sup>1</sup> It accompanies the legal entity from birth to death.

### 1. Existence and Legal Character

The personal law determines whether there is a corporation. The forum will rely on this law for affirmation or negation of its existence.<sup>2</sup> A perfected incorporation—in any state, or in the state of central control—is recognized irrespective of facts that would be considered omissions or defects in the process of incorporation and causes for dissolution under the domestic law of the forum.<sup>3</sup> Conversely, an association not enjoying legal personality in the place of attempted

<sup>1</sup> Formulations to the same effect: RG. (May 27, 1910) 73 RGZ. 366, 367 (capacity of having and exercising rights, constitution, administration, contract of association and its modifications); Código Bustamante, art. 248 (constitution, function, and responsibility of the organs).

<sup>2</sup> Restatement § 155 (1) and (2) implicitly.

England: *Henriques v. General Privileged Dutch Co.* (1728) *Ld. Raym.* 1532, 1535; *The National Bank of St. Charles v. De Bernales* (1825) 1 C. & P. 569.

United States: *First Title and Securities Co. v. U. S. Gypsum Co.* (1931) 211 Iowa 1019, 233 N. W. 137.

Examples:

Belgium: App. Bruxelles (Feb. 29, 1896) *Pasicrisie* 1896.2.365.

France: Trib. civ. Seine (July 2, 1896) *Clunet* 1899, 575.

The Netherlands: Hof Amsterdam (May 7, 1900) *W.* 7488; Rb. Rotterdam (June 5, 1913) *W.* 9549; Rb. Amsterdam (May 29, 1914) *W.* 9683, and see *KOSTERS* 675.

<sup>3</sup> Restatement § 155 comment b.

creation, is not considered anywhere an incorporated body.<sup>4</sup>

*Illustration.* The Committee of Underwriters of Hamburg brought an action in Paris. The French Supreme Court held that the plaintiff, a legal person under the law of Hamburg, and not a stock corporation,<sup>5</sup> was able to sue.<sup>6</sup>

The requirements for validity of corporations established in the state where a corporation is alleged to have been created, must be fulfilled. It may be that an act of the legislative or executive branch of the government is necessary (Soviet Union, Czechoslovakia, Poland), as was universally required in former times.<sup>7</sup> Ordinarily, however, general statutes establish the conditions under which an association may gain personality by creation through private persons for private purposes. The provisions vary with respect to every particular of the formalities, such as the documents embodying the declaration of the promoters (articles, certificate or memorandum of association or incorporation, or charter and by-laws, in Europe ordinarily one document, the "statute") and the records and advertisements necessary for public association. There is also diversity on the minimum number of members needed, the subscriptions or payments to be made, the verification of noncash contributions, and similar matters. The law of incorporation controls which provisions are conditions precedent and which mandatory, and which kind of invalidity follows an omission or mistake.<sup>8</sup> This law must be wholly satisfied.<sup>9</sup>

<sup>4</sup> Restatement § 155 comment b; *Dickey v. Southwestern Surety Ins. Co.* (1915) 119 Ark. 12, 173 S. W. 398; *Sinnott v. Hanan* (1915) 214 N. Y. 454, 108 N. E. 858.

<sup>5</sup> Otherwise the court would have denied recognition on the ground discussed *infra*, Chapter 22, pp. 130-140.

<sup>6</sup> Cass. (civ.) (July 12, 1893) *Clunet* 1893, 1204.

<sup>7</sup> App. Colmar (March 31, 1908) *Clunet* 1910, 613 (authorization required in Luxemburg).

<sup>8</sup> England: *In re The Imperial Anglo-German Bank* (1872) 26 L. T. N. S. 229; cf. YOUNG 178 n. 4.

Belgium: App. Bruxelles (April 3, 1933) *Belg. Jud.* 1924 c. 1460.

<sup>9</sup> Restatement § 155 (2).

Whether agreements by which the promoters engage themselves to bring a corporation into existence form an integral part of the proceedings needed for incorporation, is determined by the personal law. If they are not so considered, the law of contract governs.<sup>10</sup> Assuredly contracts concluded between the promoters and the members of a finance or guarantee syndicate or agreements between these persons and the bankers are not covered by the personal law.<sup>11</sup>

While the validity of the creating act is thus subjected to the law of the incorporating state, it has been objected that, unless it is validly constituted, a legal person cannot have a personal law; to determine under this personal law whether the constitution is valid, would mean a vicious circle.<sup>12</sup> But it is simply reasonable that the same law should govern the acts by which an association assumes personality, acquires capacity and an organization, as well as the discharge of its functions. The overworked argument of a *circulus inextricabilis* is once more deceptive.

Objections on the ground of public policy to technical particulars of the foreign requirements for incorporation are very seldom raised. Examples may be found in jurisdictions where one-man companies are abhorred.<sup>13</sup>

In connection with this conception, it is an important and universally settled rule that the subscribers (in the broadest meaning) to the stock of a company are liable according to the personal law of the corporation.<sup>14</sup> To support this rule,

<sup>10</sup> RG. (March 4, 1930) IPRspr. 1931 No. 11 (*Vorgründungsvertrag*), Swiss BG., 35 BGE. II 231, 36 *id.* II 387.

<sup>11</sup> 2 ARMINJON (ed. 2) 464 n. 1 § 181.

<sup>12</sup> 2 ARMINJON (ed. 2) § 183.

<sup>13</sup> Belgium: Cass. (Jan. 5, 1911) *Revue pratique des sociétés* (1911) 185; *Revue pratique du notariat* (1911) 279 (a company cannot exist with only one member).

The Netherlands: Kg. Amsterdam (May 5 and 11, 1916) W. 9978 and 10003.

<sup>14</sup> United States: *Crofoot v. Thatcher* (1899) 19 Utah 212, 57 Pac. 171; *Trent Import Co. v. Wheelwright* (1912) 118 Md. 249, 84 Atl. 543

it is usually argued in Europe that the subscribers tacitly submit themselves to the law governing the future corporation.<sup>15</sup> This argument, in fact, covers also those subscriptions which are not an essential prerequisite of the constitution. In the United States, the same result, i.e., that the action against the subscribers is determined by the law of the state of incorporation, is reached by the construction that the subscriber's offer is deemed to have been accepted by the corporation as soon as formed.<sup>16</sup>

For the formalities of the contract of association, if the contract is executed in a state other than where its commercial domicile is to be, i.e., where incorporation is to be sought, the revised text of the Treaty of Montevideo refers to the law of the place of contracting.<sup>17</sup> But this is true only to the extent to which the law of the state of incorporation refers to the local law by the rule *locus regit actum*.

## 2. Capacity (Powers)

The main idea involved in this topic is simple enough to be recorded at this juncture:

(illegal stock subscription); *May v. Roberts* (1930) 133 Ore. 643, 286 Pac. 546, 549; *Collins v. Morgan Grain Co.* (1926) 16 F. (2d) 253, 255.

Austria: OGH. (Dec. 29, 1930) 12 SZ. 956 No. 315, 6 Z.ausl.PR. (1932) 972 (Swiss law determines principal, interest, and time limitation).

France: Trib. com. Seine (May 11, 1887) Clunet 1889, 670 (Belgian law); Trib. com. Seine (June 25, 1891) Clunet 1893, 893 (Luxemburg law); Cour Paris (Aug. 4, 1893) Clunet 1893, 1226 (the buyer of a foreign share cannot invoke the French provision that shares must amount at least to 500 francs); Trib. com. Seine (March 17, 1896) Clunet 1897, 1043 (Belgian law determining prescription for the subscriber).

Germany: OLG. München (July 17, 1928) IPRspr. 1929 No. 23 (English law).

The Netherlands: Kg. Amsterdam (Dec. 11, 1916) N. J. (1917) 8.

Switzerland: BG. (Oct. 15, 1915) 41 BGE. II 588 (Swiss law on rescission, based, however, on a special argument).

<sup>15</sup> Belgium: Trib. com. Bruxelles (Dec. 31, 1907) Clunet 1908, 1231.

France: Trib. com. Seine (June 17, 1907) Clunet 1908, 170.

Germany: Common opinion, see KESSLER, 3 Z.ausl.PR. (1929) 768 No. 1.

<sup>16</sup> *Athol Music Hall Co. v. Carey* (1876) 116 Mass. 471; for other cases see WARREN, *Cases on Corporations* (1928) 175.

<sup>17</sup> Draft of Treaty on Commercial Terrestrial Law (1940) art. 26 § 2, cf. art. 7.

A corporation, if recognized, enjoys the powers conferred upon it by its charter or by the legislation of the incorporating state. This latter, the "general law" of the corporation, cannot be disregarded, unless it intends to amplify or diminish the powers of corporations or a class of them only within the territory of the state. Exceptions may be raised to the powers of a foreign corporation on the grounds of public policy, but this should not be done without the strongest reasons.

The principle includes the ability of a corporation to have rights and liabilities and to be heir or legatee,<sup>18</sup> as well as the capacity to exercise rights (capacity of enjoyment).

If consistency be observed, the personal law of the state of incorporation governs the name or firm of the entity.<sup>19</sup> Thus the German Reichsgericht protected an abbreviated name "Kwatta" under Dutch law (according to the Paris Treaty for the Protection of Commercial Property of 1883),<sup>20</sup> and the name "Eskimo Pie Co.," following the law of Delaware.<sup>21</sup>

In the European opinion, there is no doubt that the scope of this personal law embraces the right to sue and to be a party to a law suit.<sup>22</sup> This is also one of the oldest rules of

<sup>18</sup> See, for instance, *Cour Paris* (June 21, 1935) *Clunet* 1936, 884; *Trib. com. Seine* (Nov. 14, 1936) *Clunet* 1938, 307; *Revue Crit.* 1938, 57; Austrian law for existence and capacity to be a legatee of the Society for Assistance to Frenchmen in Austria.

<sup>19</sup> France: *App. Douai* (Nov. 18, 1904) D.1905.2.175; *Cass. (req.)* (Dec. 26, 1905) D.1906.1.252.

Argentina: *Cám. Fed. de la Cap.* (June 16, 1944) 34 *La Ley* 1024.

<sup>20</sup> *RG.* (Sept. 26, 1924) 109 *RGZ.* 213.

<sup>21</sup> *RG.* (June 2, 1911) 117 *RGZ.* 217.

<sup>22</sup> France: *Cour Paris* (July 20, 1936) *Clunet* 1937, 516 with the instructive distinction that the foreign corporation may sue by virtue of its capacity under article 15 of the Civil Code, but that jurisdiction is given only within the limits defined by French Code of Civ. Proc., art. 59.

Germany: STEIN-JONAS, *ZPO.* § 50 (ed. 1934) VI.

Italy: *Former C. Com.* (1882) arts. 230-232 have been considered to cover the whole field of capacity to be a party and, by the prevailing opinion, even where a foreign business corporation has failed to comply with the conditions for doing business in the Kingdom. See below pp. 142, 143, 147.

The Netherlands: Doctrine firmly settled by H.R. (March 23, 1866) W.

England, going back to the cases of 1724 and 1825,<sup>23</sup> and certainly is the true rule in this country, despite Beale's assertion that the whole problem of who may sue and be sued is procedural.<sup>24</sup>

In contrast to the capacity to be a party, the competence of certain individuals to appear in court on behalf of a corporation which is a party, may be influenced by the procedural law of the forum. This problem cannot be expounded here. American courts seem accustomed to follow consistently the *lex fori*.

What law determines the status of a corporation as a merchant, important under most civil law legislations? Opinions are divided. The personal law is applied by logical consequence in Germany, Italy, the Netherlands, and Switzerland,<sup>25</sup> and has been prescribed in an elaborate manner in

2781; see also Hof den Bosch (May 26, 1891) W. 6129 (corporation in liquidation); KOSTERS 689; Rb. Dordrecht, (Jan. 12, 1927) W. 11625, 37 Z.int.R. (1927) 447, 1 VAN HASSELT 327 (expressly declaring that reciprocity is not required for recognition); Rb. Haag (March 27, 1936) W. 1937, 665 (company constituted in Bern, Switzerland); Hof den Bosch (Feb. 9, 1937) W. 1937, 992. There is, however, a great controversy about foreign (French, Belgian) provisions denying the right of a corporation to appear in its own name; the majority of decisions regard these provisions procedural and therefore not applicable in the Dutch forum, see VAN HASSELT 3.

Scotland: Edinburgh and Glasgow Bank v. Ewan (1852) 14 Ct. Sess. (2nd ser.) 547.

Sweden: MALMAR, 7 Répert. 141 No. 149.

Switzerland: BG. (Sept. 16, 1909) 35 BGE. II 458, App. Zürich (May 2, 1938) 38 Bl.f.Zürch.Rspr. (1939) 190 n. 85: "capacity of being sued for attachment is a branch of the capacity of being a party, and this is a branch of the capacity of having rights," concerning a "curatorium of administration for the estate of the late princes, H-O, etc."

<sup>23</sup> Right to sue: Dutch West India Co. v. Henriques (1724) 1 Strange 612, *aff'd* (1728) 2 Ld. Raym. 1532, (1730) *id.* 1535; The National Bank of St. Charles v. De Bernales (1825) 1 C. & P. 569, Ry. & M. 190.

Liability to be sued: Newby v. Van Oppen and The Colt's Patent Firearms Mfg. Co. (1872) 7 Q. B. 293.

<sup>24</sup> 3 BEALE § 588.1 and 2. See *infra* pp. 142, 143, 147.

<sup>25</sup> Germany: ZPO. § 17.

Italy: App. Roma (March 3, 1932) Foro Ital. 1932 I 1173; Cass. (April 29, 1933) Foro Ital. 1933 I 1160; Cass. Roma (March 24, 1938) Giur. Ital. 1938 I, 1, 651 (an Italian company for dealing with rural land in Argentina is commercial and therefore subject to bankruptcy, though its activity is not

the *Código Bustamante*.<sup>26</sup> French courts and writers, however, advocate the law of the forum.<sup>27</sup>

By an exception universally adopted, the capacity of a corporation to commit tort is governed by the law of the place of the alleged tortious act, if the forum does not insist on its own policy.<sup>28</sup>

More detailed attention will be given below (Chapter 22) to the problems arising when contracts exceeding the powers either of the corporation or its representatives, are concluded on behalf of a foreign corporation.

### 3. Internal Organization

The problems regarding the organization of the internal life of the corporate body<sup>29</sup> include in the first place *acquisition and termination of membership*.<sup>30</sup> In a fraternal benefit

considered commercial under Argentine C. Com. art. 8. This decision is correct without regard to "qualification according to *lex fori*," as claimed by a note in *Clunet* 1939, 185.

The Netherlands: *Rb. Almelo* (Oct. 30, 1901) *W.* 7736.

Poland: *Int. Priv. Law*, art. 2; *Interlocal Priv. Law*, art. 4 (center of enterprise).

Switzerland: *VON STEIGER*, 67 *ZBJV.* (1931) 313; cf. *CAVAGLIERI*, *Dir. Int. Com.* (1936) 160-173.

<sup>26</sup> *Código Bustamante*, art. 248. See also 2 *LYON-CAEN et RENAULT* II 950 § 1127.

<sup>27</sup> *ARMINJON*, 2 *Précis* (ed. 1) 384 § 179.

Similarly, *NUSSBAUM*, *D. IPR.* 190, 194.

Mexico: *Ley General de Sociedades Mercantiles* (1934) art. 4.

*Institute of International Law*, 35 *Annuaire* (1929) II 164-167 seems to combine both principles in a singular way.

<sup>28</sup> *Restatement* § 166 comment b.

France: *Cass. (crim.)* (Aug. 8, 1873) *Clunet* 1875, 22; *Trib. corr. Seine* (March 13, 1903) *Clunet* 1903, 831; *id.* (July 27, 1910) *Clunet* 1911, 234.

Germany: *OLG. Nürnberg* (Jan. 4, 1934) *IPRspr.* 1934 No. 26; *RAAPE* 137; *NUSSBAUM*, *D. IPR.* 191 (n. 6) § 42; in other opinions: 2 *ZITELMANN* 129; *SCHNITZER*, *Handelsr.* 115; but *Liechtenstein*, *P.G.R.* art. 235 (3) requires the minimum liability established by the law of the forum.

<sup>29</sup> *Canada Southern R. Co. v. Gebhard* (1883) 109 *U. S.* 527.

<sup>30</sup> *Restatement* § 182.

England: *Baker v. Baker, Eccles & Co.* (1917) 242 *U. S.* 394 as construed by *CHEATHAM*, *Cases* 815.

France: *Cour Paris* (May 12, 1881) *Clunet* 1882, 317; *Trib. com. Seine* (May 28, 1896) *Clunet* 1896, 874.

organization, the charter and by-laws determine also who is eligible to be a beneficiary.<sup>31</sup>

*Certificates.* Membership may depend on the holding of a certificate. Whether it does, and to what extent—whether for instance actual or potential membership rights are conferred upon any holder of a share certificate—is determined by the law of the state of incorporation. If this state is one in which the conception of the common law prevails, shares are not transferable except by registration on the company's books, and any certificates of stock issued have merely evidentiary value. This system has been maintained in many existing American and Canadian statutes on stock transfer, although these allow the companies incorporated in the state to issue certificates that are indorsable in blank and transferable by delivery. Acquisition of the certificate as a tangible thing (under the law applicable thereto) confers ownership in the corporeal certificate and in addition conveys title to the share of stock as between assignor and assignee,<sup>32</sup> but membership is acquired only by subsequent registration. Under English law, however, and according to the Uniform Stock Transfer Act (adopted or substantially equalled in forty states), registered certificates, indorsed in blank or accompanied by separate instrument of transfer or assignment, bill of sale, et cetera, embody the rights of the certificate owner to demand registration as the owner of membership upon the books of the corporation. "Title to a certificate and to the share represented thereby can be transferred only by delivery of the instrument."<sup>33</sup> The share, hence, may be said

Germany: RG. (May 25, 1928) JW. 1928, 2013; RG. (March 10, 1934)

88 Seuff. Arch. (1934) 193, IPRspr. 1934 No. 11.

Switzerland: BG. (July 9, 1913) 39 BGE. II 426.

<sup>31</sup> See 2 BEALE 1212 n. 1.

<sup>32</sup> Williams v. Colonial Bank (1888) 38 Ch. D. 388; GOODRICH §§ 156-159 n. 173.

<sup>33</sup> Uniform Stock Transfer Act, § 1, 6 U. L. A. (1922).



to be materially, although not formally, merged with the certificate. Finally, the prevailing Continental type reaches the same goal by the complete merger of share and certificate in bearer shares.<sup>34</sup>

It follows that the certificate in all cases is transferred according to the law governing tangible things, viz., as is often asserted, by the law of the situs, but more precisely, by the law of the place where the certificate is delivered.<sup>35</sup> In contrast thereto, the personal law of the corporation determines, whether consent of other members, or that of the corporation, or whether recording in the books, is required to entitle the transferee to the rights of a shareholder as against the corporation, its other members, the state, and other third independent parties, to relieve the transferor from liability to the corporation, and related questions. For example, if the ownership of the certificate, embodying a share of an English private limited company, according to Swiss law is validly transferred to a Swiss bank, the rights of the acquirer are nevertheless subject to the transfer restrictions of English law.<sup>36</sup>

In an analogous way, in case of inheritance, the last personal law of the deceased will decide to whom the assets devolve, but whether one who thus acquires shares holds an effective title in relation to the corporation, is exclusively determined by the law of charter.<sup>37</sup>

*Seizures.* The application of the law of the corporation to the transfer of shares includes seizures of all kinds.<sup>38</sup> In

<sup>34</sup> I BEALE § 104.1; German RG. (March 10, 1934) IPRspr. 1934 No. 11. Another opinion seems to be expressed by M. WOLFF, IPR. 71 IV 2.

<sup>35</sup> United States: *Direction der Disconto-Gesellschaft v. United States Steel Corp.* (1925) 267 U. S. 22; See Note, 15 Cal. L. Rev. (1927) 145, 149, 150.

<sup>36</sup> See VON STEIGER, 67 ZBJV. (1931) 320.

<sup>37</sup> The comment b to Restatement § 182 is probably in accord.

<sup>38</sup> RABEL, "Situs Problems in Enemy Property Measures," 11 Law and Cont. Prob. (1945) 118, 133. As an illustration, see:

the main, this has been recognized in all those cases where shares or certificates have been confiscated. In particular, the Alien Property Custodians in this country,<sup>39</sup> in Canada,<sup>40</sup> and in South Africa<sup>41</sup> have been upheld when they vested in themselves enemy registered shares by mere notification to the central office of the company, despite circulation of the respective certificates in neutral countries, because the company law involved was based on the common law principle. On the other hand, the perceptive analysis of the principles underlying the Uniform Stock Transfer Act as adopted in New Jersey, by Judge Learned Hand, and in the Supreme Court of the United States, by Mr. Justice Holmes, recognized seizure by the English Public Trustee, of stock of the United States Steel Corporation, indorsed in blank and deposited in a bank in London for the account of German banks.<sup>42</sup> The holding of such a certificate rather than the registration upon the books of the corporation procures membership. This, the *Disconto-Gesellschaft* case, should have authority for courts everywhere. By its recognition of the mobilization of the membership embodied in the certificate, the decision relates the problem to the use of financial markets and the importance of commercial reliance, the very considerations that originated the institution of certificates to bearer. One question only has been intentionally left open by this and other cases: whether the public policy of the

The Netherlands: *Rb. Rotterdam* (Sept. 11, 1922) *W.* 10960: certificates representing German shares in an English corporation were in England and on seizure by the English trustee of enemy property transferred on the books. The Dutch court recognized the seizure according to the applicable English law.

<sup>39</sup> *Miller v. Kaliwerke Aschersleben Aktiengesellschaft* (C. C. A. 2d 1922) 283 Fed. 746; *United Cigarette Machine Co. v. Canadian Pacific R. Co.* (C. C. A. 2d 1926) 12 F. (2d) 634.

<sup>40</sup> *Spitz v. Secretary of State of Canada* [1939] 2 D. L. R. 546, Exch. C.

<sup>41</sup> *Randfontein Estates Gold Mining Co. v. Custodian of Enemy Property* (1923) S. A. L. R. App. D. 576.

<sup>42</sup> *Disconto-Gesellschaft v. U. S. Steel Corp* (1925) 267 U. S. 22.

state of incorporation overriding its own stock transfer law, may abridge the rights of bona fide holders of true bearer shares. Such an extension of war measures has not been excluded. However, thus far, no unequivocal case in which bona fide neutral acquirers of bearer shares have been divested, has occurred here or in England.

A similar classification is due to the *rights and liabilities pertaining to the members*.<sup>43</sup> The Restatement enumerates as subject to the law of incorporation:

The right of a shareholder to participate in the administration of the affairs of the corporation, in the division of profits and in the distribution of assets on dissolution and his rights on the issuance of new shares (§ 183); the right to vote, to receive dividends, etc. (comment a, *ibid.*); the right to object to corporate activities (comment b, *ibid.*).

The question whether the trustee (for the purpose of voting) will be allowed to vote the shares (§ 184).

The existence and extent of the liability of a shareholder for assessments or contribution to the corporation for the payment of debts of the corporation (§ 185).

For illustration, a certificate issued by the National City Bank of New York on "our American share" giving title to shares of a European corporation, is governed, as regards validity and content, by New York law, and with respect

<sup>43</sup> United States: Hudson River Pulp Co. v. Warner (1900) 99 Fed. 187, 39 U.S. C. A. 452; O'Brien v. Chicago R. Co. (1868) 53 Barb. (N.Y.) 568, 36 How. Pr. 24 (spurious stock); Ernst v. Elmira Municipal Improvement Co. (1898) 24 N. Y. Misc. 583, 54 N. Y. Supp. 116 (right against unlawful issue of preferred stock); Nashua Savings Bank v. Anglo-American etc. Co. (1903) 189 U. S. 221.

England: Spiller v. Turner (1897) 1 Ch. D. 911, cf. YOUNG 186.

Canada: Pickles v. China Mutual Ins. Co.; China Mutual Ins. Co. v. Smith (1913) 47 S. C. R. 429, 10 D. L. R. (1913) 323, conf'g, 46 N. S. R. 7, 3 D. L. R. 766 (Supreme Court of Nova Scotia 1912).

Belgium: App. Bruxelles (Jan. 13, 1928) Jur. Com. Brux. 1928, 42 (preferred stock of a Belgian company is not valorized, according to Belgian law).

Switzerland: BG. (April 1, 1924) 50 BGE. II 57, 58.

to the deposit of the original European shares by the proper law applicable thereto; but in all other respects the law of the incorporating state controls.<sup>44</sup>

Members are subject to assessments made in conformity to the charter, by-laws, and statutory provisions of the law of incorporation, "although they are not made parties to the proceeding for levying it."<sup>45</sup>

The same law of incorporation determines how directors are nominated and what position they hold; how and at what place the directors or committees shall meet;<sup>46</sup> all questions of internal management;<sup>47</sup> the method of distribution of profits and appropriation of earned surplus to reserves; accounting; whether a corporation is permitted to acquire its own stock,<sup>48</sup> et cetera.

Matters of internal organization, however, are not only reserved to the law of the charter, but regularly also to the jurisdiction of the courts of the state of incorporation.

*Jurisdiction.* "The English court will not interfere in the internal disputes of foreign corporations with domestic issues as between the members"<sup>49</sup>—a maxim not consistently respected.<sup>50</sup> In the United States, it has been declared that, in the absence of an office for the transfer of shares, a foreign corporation may not be sued for the issuance, transfer, or

<sup>44</sup> See FLECHTHEIM, 3 Z.ausl.PR. (1929) 118.

<sup>45</sup> Mr. Chief Justice Stone in *Pink v. A. A. A. Highway Express Inc.* (1941) 314 U. S. 201, 207; *Warner v. Delbridge & Cameron* (1896) 110 Mich. 590, 68 N. W. 283: "Every person who deals with it (the foreign corporation) everywhere and particularly one who becomes a member of the corporation, is bound to take notice of the provisions which had been made in its charter, and subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation."

<sup>46</sup> Restatement § 164.

<sup>47</sup> *San Remo Copper Min. Co. v. Moneuse* (1912) 149 App. Div. (N.Y.) 26, 133 N. Y. Supp. 509, reversed (1911) 132 N. Y. Supp. 570.

<sup>48</sup> *Tolman v. New Mexico & Dakota Mica Co.* (1885) 4 Dak. 4, 22 N. W. 505.

<sup>49</sup> *Sudlow v. Dutch Rhenish R. Co.* (1855) 21 Beav. 43, per Romilly.

<sup>50</sup> DICEY, Rule 139, n. d seems to indicate less consistency than in the American courts.

cancellation of shares;<sup>51</sup> generally, courts exercise discretion in assuming jurisdiction; it is a question of policy and convenience, not of right.<sup>52</sup> It is thought, however, that considerations of convenience, efficiency, and justice point to the court of the domicile of the corporation for settlement of the issues presented.<sup>53</sup> Analogous rules existing elsewhere are in part even stricter and more comprehensive.<sup>54</sup>

#### 4. External Relations

The personal law of the corporation controls the rights and liabilities of the corporation and of the members toward third persons, such as creditors and debtors.<sup>55</sup> In particular, it covers the powers of the corporation<sup>56</sup> and the liability of promoters, directors, advisory board,<sup>57</sup> and shareholders.<sup>58</sup>

<sup>51</sup> Restatement §§ 192, 193; *cf.* *Hopkins v. Great Western Fuse Co.* (1941) 343 Pa. 438, 22 Atl. (2d) 717; *Sternfeld v. Toxaway Tanning Co.* (1942) 290 N. Y. 294, 49 N. E. (2d) 145.

<sup>52</sup> Restatement, Scope Note to Topic 5, 279; Notes, 18 A. L. R. 1376, 1383; 32 A. L. R. 1353, 1355; 29 Col. L. Rev. (1929) 968; 27 Mich. L. Rev. (1929) 336.

<sup>53</sup> See Notes, 33 Col. L. Rev. (1933) 492; 89 A. L. R. 736; 17 Bost. U. L. Rev. (1937) 878. An exception has been mentioned *supra* Chapter 19 n. 53.

<sup>54</sup> E.g., Belgium: Law on Competence, of March 25, 1876, art. 44 gives exclusive jurisdiction to the court at the place of the principal establishment, over disputes between the administrators and members. The constitutional documents may change this rule however. See *Novelles Belges*, 3 D. Com. 349 § 2217.

France: C. Civ. Proc., art. 59, see comment by GLASSON, TISSIER et MOREL, 2 *Traité théorique et pratique de procédure civile* (ed. 3, 1926) § 360.

Germany: ZPO. § 22, HGB. §§ 272 par. 2, 309, 325; *Genossenschaftsgesetz* § 51, *Gesellschaft mit beschränkter Haftung Gesetz* § 75.

<sup>55</sup> *Canada Southern R. Co. v. Gebhard* (1883) 109 U. S. 527; a person dealing with a foreign corporation submits himself to the regulation of the foreign state discharging the corporation from liability.

<sup>56</sup> See discussion *infra* pp. 157ff.

<sup>57</sup> Restatement § 187.

<sup>58</sup> Restatement §§ 187, 190, *cf.* *Leyner Engineering Works v. Kempner* (C. C. S. D. Tex. 1908) 163 Fed. 605. On the special subject of limitation of the liability of stockholders, see the notes in 113 A. L. R. 510 and 143 A. L. R. 1442.

England: *General Steam Navigation Co. v. Guillou* (1843) 11 M. & W 877; *Bateman v. Service* (P. C. 1881) 6 App. Cas. 386, per Sir R. Couch, 388.

Canada: *Allen v. Standard Trust Co.* (1920) 57 D. L. R. 105 (Man. App.); for other cases see 3 JOHNSON 453.

For instance, where a British incorporated limited company carried on business in California, in which state the constitution and the civil code of the time declared the shareholders of a corporation liable for the debts of the corporation, the English Court of Appeals correctly denied the action.<sup>59</sup>

*Liability of stockholders in the United States.* In this country, however, the problem has been singularly confused. The provisions of California just mentioned established proportionate liability of stockholders to be applied also to stockholders of foreign corporations,<sup>60</sup> a unique and extravagant rule that fortunately was repealed in 1931.<sup>61</sup> But the not so infrequent provisions imposing some subsidiary liability upon shareholders, such as in particular on those of banking, guaranty, investment, insurance, or similar corporations<sup>62</sup> have been extended to the members of organizations of other states under qualified circumstances interesting to note.

(i) While the Supreme Court of the United States in several cases has compelled state courts to give effect to the statutory liability of members under the law of organization,<sup>63</sup> it once approved a judgment declaring a stockholder subject to the liability statute of the state whose resident he is.<sup>64</sup> Against this emphasis on the power of the domiciliary state, it should be noted with all due respect that the accidental

<sup>59</sup> *Risdon I. & L. Works v. Furness* [1906] 1 K. B. 49.

<sup>60</sup> Cal. Constitution, former § 3, art. XII; C. C., former § 322.

<sup>61</sup> Cal. Stat. (1931) p. 444; C. C. §§ 322-325a; cf. BALLANTINE, Cal. Corp. Law, 4 § 3: "This form of liability was unique and operated as a deterrent to the investment of capital here."

<sup>62</sup> E.g., see Kentucky: Rev. Stat. (1946) § 271.180 (2) (insurance); Maine: Rev. Stat. (1944) c. 49 § 117; Ill. Constitution, art. 11 § 6.

<sup>63</sup> *Converse v. Hamilton* (1912) 224 U. S. 243; *Supreme Council of the Royal Arcanum v. Green* (1915) 237 U. S. 531; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357. Accordingly, *Groesbeck v. Beaupre* (1940) 307 Ill. App. 215, 30 N. E. (2d) 531.

<sup>64</sup> *Pinney v. Nelson* (1901) 183 U. S. 144; followed by Restatement § 191 comment a.

domicil of an individual should not interfere with the structure of a capital organization recognized under our basic principles for common interest. Otherwise, local liability rules ought to be applied also when they are more favorable to the stockholder than the rules governing the corporation.

In fact, when a citizen of New Jersey was sued on his individual additional liability as a stockholder of a banking corporation of Florida, the New Jersey court dismissed the action with reference to a local statute.<sup>65</sup> A naïve annotation tried to justify this decision constitutionally by the argument that the claim was not based on a judgment but on a statutory liability.<sup>66</sup> These seem to be isolated aberrations.

(ii) Although the stockholder was not a resident and the corporation was foreign, he was held subject to the liability statute of the state where the corporation concluded a contract. The courts assumed an agreement of the stockholder with the third party whereby he was deemed to have submitted to the statute of the place of contracting, either when the charter of the corporation expressly authorized doing business in that state or even when the charter failed to specify the states in which business may be conducted.<sup>67</sup> These fictitious constructions were aptly refuted in the case of *Thomas v. Matthiessen*<sup>68</sup> by the Federal Courts of New York, Judge Ward of the Circuit Court of Appeals declaring that under the theories rejected "corporate stock is liable to become in this country an uncertain and even dangerous

<sup>65</sup> *Cochrane v. Morris* (1931) 10 N. J. Misc. 82, 157 Atl. 652.

<sup>66</sup> 57 N. J. L. J. (1934) 261.

<sup>67</sup> See the California cases cited in Restatement California Annotations § 191. Other cases and argumentations on the same lines in Notes, 23 Harv. L. Rev. (1910) 37, 12 Col. L. Rev. (1912) 450, 27 Harv. L. Rev. (1914) 575. This strange argument has been shared by YOUNG and by STEVENS 729 n. 182.

The Restatement § 191, trying to reduce the scope of the local law, still applies it when "(b) the shareholder has personally taken part in doing the act or causing it to be done, or (c) has notice that the corporation was formed to do business there."

<sup>68</sup> (C. C. D. N. Y. 1909) 170 Fed. 362; (1911) 192 Fed. 495.

asset." The Supreme Court, however, although approving of this reasoning, found factually that the New York stockholders of a New York corporation had agreed to liability under the law of Arizona, because by the charter the corporation was specially organized to do business in Arizona and California.<sup>69</sup>

We may in fact, as explained before, set aside the case where a business organization is intended to operate exclusively, or at least principally, in a state other than that of incorporation; this, however, should be done, if at all, only under some theory of evasion that is to be based, not on the behavior or domicile of any particular stockholder, but on the contrast between the corporate purposes and the selection of the state in which to incorporate. In *Peck v. Noee*, the corporation was organized to do business in California only, and its organizers and officers were California residents.<sup>70</sup> In this case, probably with stronger facts than in that of *Thomas v. Matthiessen*, the local law might have had a claim.<sup>71</sup> All other arguments against the exclusive application of the law of the charter are evidently induced by mistaken application of the conflicts rule that a principal is bound to the construction given to his authority by the law of the state where the agent acts upon it. In our case, no such construction can alter the fact that the stockholders have agreed only to a charter limiting their liability to their share in the stock, and hence have given approval to business carried on in whatever place, only at the risk of the corporation and not otherwise. To reason as though individual stockholders or all stockholders by allowing business abroad have waived the limitation of their liability, is gratuitous.

On the other hand, the exclusive application of the law

<sup>69</sup> (1913) 232 U. S. 221.

<sup>70</sup> *Peck v. Noee* (1908) 154 Cal. 351, 97 Pac. 865.

<sup>71</sup> Cf. STUMBERG 340.



of the charter is entirely desirable in the interest of certainty and equity, even if more reliable expressions for exception could be found than in the helpless formulation of the Restatement (*supra* note 67).

*Borderline problems.* Special attention will be given later to the authority of the principal representatives of a corporation contracting with third persons. There is no doubt, however, on principle that the personal law of the entity controls.<sup>72</sup> Only the border line between this and other conflicts rules causes some difficulties. In particular, the territorial law of the country where a foreign corporation does business is likely to claim consideration of its own rules. Application of the law governing the contract may further complicate the problem. Young in his excellent monograph, trying to find a just delimitation, proposed that only those rules and enactments which relate to the permanent character and constitution of a juristic person, or to the relations of its members *inter se* and toward the juristic person itself, should be regarded as part of its personal law having extraterritorial effect; no enactment made to protect the interests of third parties should be included.<sup>73</sup> This is not a suitable proposition, because the law of the incorporating state, too, generally has rules protecting third parties which ought to be applied and because the local law is also entitled to regulate business

<sup>72</sup> United States: 2 BEALE 758 § 165.1.

England: *Banco de Bilbao v. Antonio Rey y Zardoya*, K. B. (1937), "not published" in England, *Clunet* 1938, 602; *aff'd*, 2 All E. R. [1938] 253-C. A.: revocation of powers of employees under Spanish Constitution and C. Com. art. 21.

Brazil: Sup. Trib. Fed. (Sept. 2, 1908) 107 O Direito 215.

France: App. Douai (April 28, 1897) D.1899.2.195.

Germany: KG. (March 8, 1929) IPRspr. 1929 No. 21.

The Netherlands: H. R. (Jan. 12, 1933) W. 12626; charter of Belgian *comptoir* determines agent's power to conclude a cartel with Dutch and German companies.

<sup>73</sup> YOUNG 185. If he says: "A state cannot exercise its legislative powers over the subjects of other states, even to protect them," he adds a new "cannot" to those well criticized by himself.

conducted in its territory in respects not concerning the interest of third parties but the public interest.

## 5. Modification and End

The law of the state of incorporation determines:

Alteration of the charter or by-laws, e.g., increase or decrease of the capital stock;<sup>74</sup> annulment of the charter;<sup>75</sup> its expiration by lapse of time;<sup>76</sup> dissolution,<sup>77</sup> whether voluntary or forced,<sup>78</sup> its method and cause;<sup>79</sup> in states recognizing the extraterritorial effect of foreign adjudications in bankruptcy,<sup>80</sup> the effect of such adjudication on the existence and representation of the corporation;<sup>81</sup> and its continuation after a certificate of dissolution for purposes of winding up or actions of debt.<sup>82</sup>

<sup>74</sup> Austria: OGH. (Dec. 29, 1930) 12 Amtl. S. No. 315.

France: Trib. com. Seine (June 5, 1875) Clunet 1876, 363.

Germany: RG. (May 27, 1910) 76 RGZ. 366, 20 Z.int.R. 408 (Dutch law applied, art. 289 par. 3 of the German HGB. declared inapplicable).

<sup>75</sup> See *supra* ns. 2ff.

<sup>76</sup> *Sturges v. Vanderbilt* (1878) 73 N. Y. 384.

<sup>77</sup> United States: *Relfe v. Rundle* (1880) 103 U. S. 222: right of appointed state official against shareholder; approved for England by Dicey.

England: *Banque Internationale de Commerce de Petrograd v. Goukassow* [1923] 2 K. B. 682 at 691.

France: App. Chambéry (Dec. 1, 1866) S.1867.2.182; App. Paris (June 15, 1937) Clunet 1937, 812 (jurisdiction denied).

Germany: RG. (May 20, 1930) 129 RGZ. 98; OLG. Frankfurt (Nov. 1, 1907) 16 ROLG. 100; OLG. Köln (June 20, 1913) Rhein. Arch. 119.

The Netherlands: Rb. Amsterdam (April 22, 1910) W. 9159; (Jan. 26, 1923) W. 11054; Rb. Maastricht (June 25, 1931) W. 12366 (powers of liquidators).

Switzerland: 51 BGE. II 264, 14 Praxis 371; Bern, ZBJV. (1907) 555.

<sup>78</sup> Belgo-German Mixed Arb. Trib., *Bender Eregli v. Stinnes*, 5 Recueil trib. arb. mixtes 751.

<sup>79</sup> *Sinnott v. Hanan* (1913) 156 App. Div. (N. Y.) 323, 141 N. Y. Supp. 505.

<sup>80</sup> See NADELMANN, "The Recognition of American Arrangements Abroad," 90 U. of Pa. L. Rev. (1942) 780, 789.

<sup>81</sup> England: (As to movables) principle of *Solomon v. Ross* (1764) 1 H. Bl. 131 (n); see CHESHIRE 478.

<sup>82</sup> Restatement § 158 comment c; *O'Reilly, Skelly & Fogarty Co. v. Greene* (1896) 40 N. Y. Supp. 360, *aff'd*, 41 N. Y. Supp. 1056; *Sinnott v. Hanan* (1915) 214 N. Y. 454, 108 N. E. 858.

Germany: OLG. Frankfurt (Feb. 21, 1933) IPRspr. 1933 No. 4, applying § 105 n. 8 of the New York Stock Corporation Law.

If the state of incorporation does not provide for a suit in the corporate name after dissolution, an American rule provides that where the corporation was doing business or had property in another state, it may be kept alive by the statutes of this latter state for the purpose of suing or being sued, and that the effect on the winding up of the business or on the property existing in that state will be recognized in third states.<sup>83</sup> This rule deserves universal application, although on the Continent statutes on dissolution generally do prescribe continuation for the purpose and duration of winding up, if the formal dissolution is not deferred until this moment. Thus, where an English company had been dissolved without satisfying the claim of a certain creditor who sued for payment out of German immovables recorded in the land register in the name of the company, the German court found it impossible directly to apply the English rules; it considered the company as continuing for the purpose of the suit.<sup>84</sup> The fiction, of course, does not refer to any business done after the dissolution.<sup>85</sup> No such statute was available in the case of Soviet nationalization, which will be mentioned below; hence, the House of Lords had to decide whether a dissolved Russian company could sue for debt in England, which was granted by the narrow margin of three votes against two.<sup>86</sup>

As a jurisdictional effect, it is generally held that the court of the corporation's domicile has exclusive power to dissolve

<sup>83</sup> Restatement § 158 comment d; *Rodgers v. The Adriatic Fire Ins. Co.* (1895) 148 N. Y. 34, 42 N. E. 515, 516; *People v. Mercantile Credit Co.* (1901) 65 App. Div. (N. Y.) 306, 309, 72 N. Y. Supp. 858.

<sup>84</sup> *Cour Paris* (July 6, 1935) *Clunet* 1936, 916. This was disregarded in *Gibbs and Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 Q. B. D. 399, criticized by YOUNG 181.

<sup>85</sup> OLG. Frankfurt (Nov. 1, 1907) 16 ROLG. 100. The Reichsgericht declared that no such proceeding would be granted in the mere interest of the shareholders, RG. (May 20, 1930) 129 RGZ. 98, 107. See German HGB. § 302.

<sup>86</sup> *Russian & English Bank v. Baring Bros. & Co., Ltd.* [1936] A. C. 405.

as well as to annul the legal person.<sup>87</sup> Perfectly distinguishable is the jurisdiction exercised in any state where business is carried on to wind up dissolved foreign corporations or partnerships.<sup>88</sup> In England, a technical doubt whether winding up may follow dissolution in an order contrary to common law, was resolved by an express provision of the Companies Law.<sup>89</sup>

When in 1901 France dissolved all religious congregations that had not obtained authorization, the Fathers of Chartreux were correctly recognized in Switzerland as an association because they had transferred their domicile and recreated their legal form in other countries.<sup>90</sup> The *Frères des écoles chrétiennes* should have been recognized also in France, insofar as they had mother houses in other countries.<sup>91</sup> The dissolved French congregations themselves could not be recognized in any country except on the ground of public policy; this seems not to have occurred. Also, the dissolution of the Bank of Ethiopia by the Italian Government has been recognized elsewhere.<sup>92</sup>

*Soviet nationalization.* On a large scale, the problems of

<sup>87</sup> United States: Restatement New York Annotations § 157 n. 2; 2 BEALE 742 § 157.2; *Barclay v. Talman* (1842) 4 Edw. Ch. 128.

France: Trib. civ. Seine (Jan. 8, 1912) *Revue* 1912, 402, cf. 2 ARMINJON (ed. 1) § 183. *Contra*: PILLET, *Personnes Morales* § 172.

Belgium: Trib. Liège (July 23, 1891) *Clunet* 1893, 1243; cf. 3 ROLIN §§ 1264, 1284.

<sup>88</sup> England: *In re Comm. Bank of South Australia* (1886) 33 Ch. D. 173, 174.

United States: *Lowe v. Pressed Metal Co.* (1916) 91 Conn. 91, 99 Atl. 1.

<sup>89</sup> WESTLAKE § 132; DICEY 326; *In re Comm. Bank of India* (1868) 6 Eq. 517; *In re Matheson Bros. Ltd.* (1884) 27 Ch. D. 225; *In re Mercantile Bank of Australia* (1892) 2 Ch. D. 204. See Companies Act, 1929, § 338 (1): this rule requires only a "place of business," not an "established place of business" in England, Cohen, J., *In re Tovarishestvo Manufactur Liudvig-Rabeneck* [1944] 1 Ch. 404, 408.

<sup>90</sup> Switzerland: 32 BGE. I 157; 39 BGE. II 651.

<sup>91</sup> See PILLET, *Personnes Morales* § 293 against a decision of Trib. corr. Seine.

<sup>92</sup> *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. D. 513, 3 All E. R. 8, *Clunet* 1938, 105.

dissolution and winding up have been discussed in the many cases arising out of the Soviet Decree of December 14, 1917, pronouncing the nationalization of Russian companies.<sup>93</sup> The first impulse everywhere was to deny the Soviet Decree recognition. This was done by some courts on the ground that the Soviet Union had not received recognition by the government of the forum.<sup>94</sup> But in this country, Cardozo, J., in the New York Court of Appeals refuted this specious argument at a time when the American Government had not yet recognized the Soviet Government *de jure*.<sup>95</sup> This accords with the decisions of the Federal Tribunal of Switzerland, which had not recognized the Soviets until 1946.<sup>96</sup> Recognition of a government has nothing to do with the existence of a private person. Other courts held that the Soviet provisions were not really meant to dissolve the corporation<sup>97</sup> or to extend beyond Russian frontiers<sup>98</sup>—both inexact assumptions.<sup>99</sup>

<sup>93</sup> CONNICK, 34 Yale L. J. (1925) 499, NEBOLSINE, "The Recovery of the Foreign Assets of Nationalized Russian Corporations," 39 Yale L. J. (1930) 1130.

<sup>94</sup> United States: Fred S. Tames & Co. v. Second Russian Ins. Co. (App. Div. N. Y. 1924) 203 N. Y. Supp. 232, 146 N. E. 369; Joint Stock Co. of Volgakama etc. v. National City Bank (App. Div. N. Y. 1924) 206 N. Y. Supp. 476.

England: Russian Bank of Foreign Trade v. Excess Ins. Co. [1919] K. B. 39, 35 T. L. R. 42. The Eastern Carrying Ins. Co. v. Nat'l Benefits Life & Prop. Ins. Co., Ltd. (1919) 35 T. L. R. 292.

<sup>95</sup> Sokoloff v. Nat'l City Bank of New York (1924) 239 N. Y. 158, 165, 145 N. E. 917, 918; Note, CONNICK, 34 Yale L. J. (1925) 499; cf. Lehman, J., opinion in Dougherty v. Equitable Life Assurance Society (1934) 266 N. Y. 71, 109.

<sup>96</sup> Switzerland: 50 BGE. II 511; 51 *id.* II 263; 55 *id.* I 289, Clunet 1930, 1164.

<sup>97</sup> England: House of Lords in Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1925] A. C. 112; 40 T. L. R. 837, the first case after the British recognition of the Soviet Government; followed by numerous others, see WORTLEY, 14 Brit. Year Book Int. Law (1933) 4, 5.

Germany: KG. (March 31, 1925) JW. 1925, 1300, Clunet 1925, 1057.

<sup>98</sup> England: Employers' Liability Assurance Corp. v. Sedgwick, Collins & Co. [1927] A. C. 95; The Jupiter [1927] P. 250, 253; Woronin, Luetscheg & Cheshire v. Frederick Huth & Co. (K. B. 1928) Clunet 1928, 756, 758.

<sup>99</sup> MAKAROV, Précis 219; opinion of Schoendorf stated by the KG. (Oct. 25, 1927) JW. 1928, 1232, IPRspr. 1928 No. 14.

Most appealing was the frank statement that the confiscatory character of the decrees offended the public policy of the forum.<sup>100</sup> Numerous French judgments up to 1928 declared more precisely that, while the title validly passed within Russia, it was contrary to French public policy, that by socialization the legal existence of the enterprises should be destroyed within France.<sup>101</sup> This opinion was shared by the New York courts and expressed as late as 1934.<sup>102</sup> On this basis, the capacity of the nationalized corporation to appear in court was affirmed,<sup>103</sup> provided that directors suing in the name of the corporation showed authorization from its stockholders.<sup>104</sup>

The matter has become obsolete, however, in this country, inasmuch as the Soviet Government on the occasion of its recognition *de jure* by the so-called Litvinoff agreement, has assigned to the United States Government any claims it may have had to property within the territory of the United States.<sup>105</sup> The Court of Appeals of New York nevertheless

<sup>100</sup> France: Trib. com. Marseilles (April 23, 1925) Clunet 1925, 391; App. Bordeaux (Jan. 2, 1928) and Cour Paris (June 13, 1928) S.1928.2.161; cf. NIBOYET, Clunet 1929, 115; App. Aix (Dec. 23, 1925) Clunet 1926, 667.

The Netherlands: Rb. Haag (March 9, 1933) W. 12589, VAN HASSELT 335. The former director was considered representative in view of the impossibility of holding a general meeting of shareholders.

In Germany, this opinion could not be maintained, in view of the Treaty of Rapallo of April 16, 1922, art. 2, whereby Germany recognized the Soviet legislation, see RG. (May 20, 1930) 129 RGZ. 98.

<sup>101</sup> Trib. com. Seine (Jan. 16, 1922) Clunet 1923, 539; (April 26, 1922) Clunet 1923, 933; (March 23, 1925) Clunet 1927, 352; (April 12, 1926) Clunet 1927, 357; Trib. com. Seine (Oct. 1, 1926) Clunet 1927, 359.

<sup>102</sup> Salimoff & Co. v. Standard Oil Co. of New York (1933) 262 N. Y. 220, 186 N. E. 679, Note, 33 Col. L. Rev. (1933) 750; Vladikavkazsky R. Co. v. New York Trust Co. (1934) 263 N. Y. 369, 189 N. E. 456, Note, 34 Col. L. Rev. (1934) 962. See the survey by Lehman, J., opinion in Dougherty v. Equitable Life Assurance Society (1934) 266 N. Y. 71 at 106.

<sup>103</sup> James & Co. v. Second Russian Ins. Co. (1925) 239 N. Y. 248, 146 N. E. 369; Russian Reinsurance Co. v. Stoddard (1925) 211 App. Div. 132, 207 N. Y. Supp. 574.

<sup>104</sup> Banque Internationale v. Nat'l City Bank of New York (1929) 133 N. Y. Misc. 527, 233 N. Y. Supp. 255.

<sup>105</sup> See 28 Am. J. Int. Law (1934) Supp. 10; State of Russia v. Nat'l City Bank of New York (1934) 69 F. (2d) 44.

held a local branch of a Czarist Russian insurance company existent, the strong state control over insurance business warranting a distinct personality of the branch despite the disappearance of the mother company.<sup>106</sup> But the Supreme Court of the United States has overruled this construction and all other objections to the extraterritorial effect of the Soviet confiscatory decrees.<sup>107</sup> The theory of the Court, which identifies governmental recognition of the Soviet Government with binding recognition of the nationalization decrees, is a regrettable deviation from well-settled principles of international law.<sup>108</sup>

In Europe, where litigation was more frequent, all objections finally vanished; the personal law has won full victory. The power of a state to establish a legal person susceptible of being recognized everywhere implies a power to terminate it with extraterritorial effect. Hence, the courts accepted the proposition that the Russian corporations had ended.<sup>109</sup>

<sup>106</sup> *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.* (1939) 280 N. Y. 286, 20 N. E. (2d) 758, *aff'd* (1940) 309 U. S. 624.

<sup>107</sup> *U. S. v. Pink* (1942) 315 U. S. 203.

<sup>108</sup> BORCHARD, "Extra-territorial Confiscations," 36 *Am. J. Int. Law* (1942) 275. JESSUP, "The Litvinov Assignment and the Pink Case," *id.* 282, 285; Note, 51 *Yale L. J.* (1942) 848; LAUTERPACHT, *Annual Digest* 1938-1942 (1942) 141, 150.

<sup>109</sup> England: *Lazard Bros. & Co. v. Midland Bank, Ltd.* [1932] 1 K. B. 617, *aff'd*, House of Lords [1933] A. C. 289, *Clunet* 1934, 159; *In re Russian Bank for Foreign Trade* [1933] 1 Ch. 745, *Clunet* 1934, 445.

Belgium: App. Bruxelles (July 11, 1936) *Revue Crit.* 1937, 121.

France: Cour Paris (June 13, 1928) *Revue* 1929, 93; and (July 22, 1929) *Clunet* 1929, 1095 expressly reversing its stand of May 17, 1927, *Clunet* 1928, 131. Cass. (req.) (July 29, 1929) D. H. 1929, 457, *Clunet* 1930, 680 *Revue* 1931, 342; Trib. com. Seine (Jan. 20, 1936) *Revue Crit.* 1937, 117; Trib. com. Seine (Jan. 15, 1934) *Revue Crit.* 1935, 468 and Cour Paris (July 15, 1935) *Revue Crit.* 1936, 158 (bank accounts necessarily stopped at the date of nationalization).

Germany: KG. (Oct. 25, 1927) JW. 1928, 1232, IPRspr. 1928 No. 14, and especially RG. (May 20, 1930) 129 RGZ. 98, JW. 1931, 141, IPRspr. 1930 No. 9; RG. (July 11, 1934) JW. 1934, 2845, IPRspr. 1934 No. 12, *Clunet* 1935, 164; 6 *Giur. Comp. DIP.* § 245.

Poland: S. Ct. (Dec. 4, 1929) *Clunet* 1931, 770.

Switzerland: Despite nonrecognition of the Soviet Government, see *supra* n. 96.

What then happens to the assets left by a former Russian corporation in another country? Unanimously, the courts hold that the confiscatory effect of the Soviet legislation cannot reach assets situated abroad. One reason adduced is that such confiscation violates a stringent policy of the forum.<sup>110</sup> A more convincing argument regards the character of the fiscal privilege claimed by the Soviet Government as necessarily limited to the territory under its sovereignty.<sup>111</sup> While there is some old divergence of opinion about the legal character of a right of inheritance that a state ascribes to itself, the Soviet State had evidently exercised the right of a state to occupy ownerless property (*bona vacantia*), a right internationally confined to assets within the territory of the state. Whatever the intention of the Soviet Government may have been, another state is entitled, on its own soil, to deal with the assets according to its own conceptions.

Generally, on the request of a national creditor or stockholder, an administrator was appointed by a competent court.<sup>112</sup> Business managed by local agents of the defunct corporations was liquidated.<sup>113</sup> In New York, branches of Russian insurance companies have been liquidated under the Insurance Law.<sup>114</sup>

Are shareholders, however, able to join in a suit to continue

<sup>110</sup> Swiss BG. (July 13, 1925) 51 BGE. II 259, 264; App. Paris (June 13, 1928) Clunet 1929, 119. See also MAKAROV, Précis 220.

<sup>111</sup> Hamilton v. Accessory Transit Co. (N. Y. 1857) 26 Barb. 46; The Jupiter [1927] P. 122, 250.

<sup>112</sup> France: Cour Paris (Oct. 31, 1935) Clunet 1936, 337.

Germany: BGB. § 1913.

Switzerland: BG. (Oct. 26, 1929) 55 BGE. I 289, Clunet 1930, 1164.

For England, recommended by WORTLEY, 14 Brit. Year Book Int. Law (1933) 8; Latvia, Laws of April 17, 1925 and Sept. 16, 1927, and Poland, Decree-Law of March 22, 1928, cf. Polish S. Ct. (Dec. 4, 1929) Clunet 1931, 770 expressly prescribed liquidation, while Esthonia, Decree of Oct. 27, 1920 provided for compulsory domestication of branches of Russian stock corporations.

<sup>113</sup> Great Britain: Companies Act, 1929, § 338 (2).

<sup>114</sup> Matter of People (Russian Reinsurance Co.) (1931) 255 N. Y. 415 175 N. E. 114.



the former corporation? While this was held impossible in Germany,<sup>115</sup> the device of a *de facto* company has been used in France and Belgium,<sup>116</sup> if there were common assets to be administered in the country.<sup>117</sup> Officers of the former company may be considered administrators.<sup>118</sup> The nationalized corporation is liable to be sued for the debts of the old firm at least those to creditors who are nationals of the forum.<sup>119</sup> Again, when uncertain situations are apt to arise, winding up or bankruptcy (*liquidation judiciaire*) may be ordered at any moment at the request of shareholders or creditors, respectively.<sup>120</sup> In this case, any theory of universality being excluded by the disappearance of the Russian legal entity, every country conducts separate proceedings, although a receiver may be appointed at a place where refugee directors and shareholders control the business *de facto*.<sup>121</sup>

<sup>115</sup> RG. (May 20, 1930), 129 RGZ. 98.

<sup>116</sup> App. Bruxelles (July 11, 1938) 41 Bull. Inst. Int. (1939) 273 No. 10934.

<sup>117</sup> In absence of such property, jurisdiction has been denied; see Cour Paris (June 15, 1937) Clunet 1937, 812.

<sup>118</sup> Trib. com. Seine (June 17, 1934) Clunet 1935, 117.

<sup>119</sup> Cour Paris (March 29, 1938) Deutsche Bank v. Ass'n des Porteurs etc., Clunet 1938, 1017; *id.* (April 12, 1938) Deutsche Bank v. Banque Internationale de Petrograd, Nouv. Revue 1938, 617.

<sup>120</sup> France: See the decisions of Trib. com. Seine of 1934 to 1936, reported in Clunet 1935, 125; Revue Crit. 1935, 491; 1937, 117.

Belgium: Trib. com. Liège (March 25, 1938) 41 Bull. Inst. Int. (1939) 273 No. 10933: the company continues to function in Belgium but must be dissolved at the request of any stockholder to satisfy first the non-Russian creditors, and after them the non-Russian shareholders. Difficulties arising from the territorial limits of liquidators appointed in France are illustrated in App. Bruxelles (July 11, 1938) summarized in 41 Bull. Inst. Int. (1939) 273 No. 10934.

<sup>121</sup> App. Bruxelles (July 11, 1936) Revue Crit. 1937, 221.

## CHAPTER 21

# Unincorporated Business Organizations

### I. METHOD OF LEGAL CONSTRUCTION

#### 1. The Old Antithesis

CLINGING to the inherited simple contrast between corporation and partnership, the literature for too long a time was lost in speculation over the nature of unincorporated organizations. The most significant dispute concerned the ordinary mercantile partnership which very clearly does not fit into the categories either of juristic persons or of mere contracts of *societas*. A deep cleavage among the European scholars was reflected in the split between the French doctrine, followed widely in Latin countries and influential in Louisiana,<sup>1</sup> which acknowledges mercantile<sup>2</sup> collective societies as juristic persons, and the German theory accepted in many other countries, which denies that an

<sup>1</sup> Louisiana courts, more definitely than any others, have pronounced that a partnership is a civil person: *Smith v. McMicken* (1848) 3 La. Ann. 319, 322; *Succession of Pilcher* (1887) 39 La. Ann. 362, 1 So. 929; *Newman v. Eldridge* (1902) 107 La. 315, 31 So. 688; *Stothart v. William T. Hardie & Co.* (1903) 110 La. 696, 34 So. 740. Particularly informative with respect to the liability of commercial partnerships domiciled in Louisiana is *Liverpool, Brazil & River Platte Navigation Co. v. Agar & Lelong* (C. C. E. D. La. 1882) 14 Fed. 615. Of course there were limitations to this theory, see *Drews v. Williams* (1898) 50 La. Ann. 579, 23 So. 897. Although Louisiana did not adopt the Uniform Partnership Act, the old sweeping definitions appear to have vanished.

<sup>2</sup> The French doctrine distinguishes commercial (which are deemed to be recognized as juristic persons by C. C. art. 529) and civil societies (whose nature was in controversy) but the distinction has become of minor importance, since the courts have gradually recognized the legal personality also of the "civil" societies, and the Law of August 1, 1893, art. 68 has subjected civil societies clothed in the form of commercial companies to the commercial laws. See *PLANIOL et RIPERT* (et *LEPARGNEUR*), 11 *Traité Pratique* 248 § 989. These enlargements have not been followed in all countries adhering to the French type.

*offene Handelsgesellschaft* is a legal unit. An analogous debate divided American authors when the Uniform Partnership Act was drafted. On the one hand, the draft was attacked on the ground that it made concessions to the legal unit theory but did not acknowledge it completely,<sup>3</sup> and, on the other hand, it was claimed that the draft, while purporting to adopt the aggregate theory, had in reality diluted it.<sup>4</sup> As late as 1929, Warren even resented the language of the Uniform Act which spoke of the partnership as "it" and as having assets!<sup>5</sup>

The Uniform Act, however, embodying the best practical solution conforming to universal business conceptions,<sup>6</sup> has victoriously demonstrated that the dilemma was futile. The result of the act coincides with the conclusion reached in Germany, Switzerland, Scandinavia, Argentina, and other countries. The aggregate theory is the basis and certain features of a corporation are avoided, but there is a name or firm; assets, creditors, and debtors of the partnership exist in a marked sense; enforcement of claims and bankruptcy are assured; and in an increasing number of jurisdictions the partnership may be sued and even may sue, although methods and effects may slightly vary.<sup>7</sup>

<sup>3</sup> CRANE, "The Uniform Partnership Act, a Criticism," 28 Harv. L. Rev. (1915) 762. See *contra* WM. DRAPER LEWIS, "The Uniform Partnership Act, a Reply to Mr. Crane's Criticism," 29 Harv. L. Rev. (1916) 158, 159; again CRANE, "The Uniform Partnership Act and Legal Persons," *id.* 838.

<sup>4</sup> WARREN, *Corporate Advantages* 29, 293. In my opinion, this unfortunate work of an eminent author has been properly censured by MAGILL, 30 Col. L. Rev. (1929) 144 and WHIPPLE, 39 Yale L. J. (1930) 144, but it seems still to exercise some influence.

<sup>5</sup> WARREN, *Corporate Advantages* 295.

<sup>6</sup> See 7 Uniform Laws Annotated, and WRIGHTINGTON, *The Law of Unincorporated Associations* (1916) 144. The Act, in 1944, was in force in twenty-four states including the most industrial regions.

<sup>7</sup> Austria: Allg. HGB. art. 111.

Germany: HGB. § 124 par. 1.

Liechtenstein: P. G. R. § 697.

Poland: C. Com. (1934) § 81.

Switzerland: C. Obl. art. 559.

In theoretical formulation of the common result, the partnership is regarded not as an independent person, but as a unit at every moment identical with the partners for the time being; the partners in their specific conjunction and not the general partners separately are the owners of the assets and, potentially, parties to lawsuits.<sup>8</sup>

Similar controversies have involved joint stock corporations, limited partnerships, and business trusts, despite their high content of corporate elements.

## 2. Gradation of Corporate Character

The European literature at long last has perceived the multifarious gradations established by modern inventiveness between the extremes of a mere contract of associates and a complete legal person.<sup>9</sup> Indeed, it is a statement of sober truth that a partnership is not a corporation. That the French *société en nom collectif* is generally termed a legal person, has been criticized by the author of the French standard work on juristic personality, because this type, too, is far from embodying all features of a regular corporation.<sup>10</sup> But nothing is gained on the other hand by ignoring in juristic construction all those indicia of corporateness that make even ordinary partnerships appear legal bodies to businessmen. The dispute should find an end in Judge Learned Hand's suggestion that the entity of the firm should be constantly recognized and enforced in accordance with business usages and under-

<sup>8</sup> See LEWIS, 29 Harv. L. Rev. (1915) 158, and the "constant view of the Reichsgericht," as expressed in 46 RGZ. 41; 65 *id.* 21, 229; 86 *id.* 70; WIELAND, 1 Handelsr. 420 n. 61, 621-628; STAUB-PINNER in 1 Staub § 105 n. 8. MÜGEL, Offene Handelsgesellschaft, in 5 Rechtsvergl. Handwörterbuch at 466 has correctly argued that there is no reason why the capacity of partnerships of being a party to a lawsuit should not be construed analogously to its other capacities.

<sup>9</sup> Final clarification was due in the first place to CARL WIELAND, 1 Handelsr. (1921) 396-434.

<sup>10</sup> MICHOUX, 1 Personnalité Morale §§ 68 and 72, 2 *id.* 328 n. 1; see also LEHMANN, 74 Z. Handelsr. (1913) 465.

standing; "like the concept of a corporation, it is for many purposes a device of the utmost value in clarifying ideas and in making easy the solution of legal relations."<sup>11</sup>

In this country, as a matter of fact, judges and draftsmen perceived the truth earlier than in Europe. More than anything else the doctrine of *de facto* corporations demonstrated that corporate functions can be exercised without a formally independent personality. The doctrine of "disregarding corporate nature" to obviate abuses was a complement thereto. The continuous necessity of comparing the different institutions of the states was educational in preventing overestimation of the corporation label. "It is difficult to find what peculiar powers or privileges can only be possessed by corporations or associations which must be regarded as incorporated or personified."<sup>12</sup> Indeed, entirely separate capacity is the only essential attribute of a corporation. A common name, common funds or ownership of property, continuity of existence unaffected by changes in the membership, transferable shares, concentration of power in the management, limited liability of members, capacity to sue and be sued, capacity to be declared bankrupt—these and other features of an ordinary stock company may be more or less broadly combined in the structure of unincorporated bodies.

### 3. Purposes of Construction

It is a familiar and good method to analyze the corporate elements in a foreign type of association for the purpose of applying the corresponding domestic rules on corporations. Such associations may be assimilated to domestic business corporations from certain points of view and differentiated

<sup>11</sup> *In re* Samuels & Lesser (D. C. S. D. New York 1913) 207 Fed. 195, 198. An excellent comparison between corporation and partnership with respect to their changeable attributes is given in FLETCHER, 17 Cyc. Corp. § 20.

<sup>12</sup> BALLANTINE, Corporations 11 § 4; to exactly the same effect, STEVENS, Corporations § 5.

from others.<sup>13</sup> American courts are particularly well prepared to inquire into the composition of an organization without being influenced either by dogmatic preconceptions or mere names of institutions. For instance, in a famous American leading case, the Liverpool Insurance Company, an English joint stock corporation, was subjected to taxation in Massachusetts as a foreign corporation. The Supreme Court of the United States approved the constitutionality of this discrimination.<sup>14</sup> It is a confusion, unfortunately still significant of a part of the literature, that the *Liverpool* case has been contrasted with such cases as *Great Southern Fire Proof Hotel Co. v. Jones*,<sup>15</sup> in which a Pennsylvania limited partnership was declared not to be a corporation, although it is a well-known type of a near-corporation, definitely nearer to the full-fledged type than an English joint stock corporation.<sup>16</sup> The explanation is very simple and by no means a secret. The case dealt with access to the federal courts on the ground of diverse citizenship, and there is a strong tendency to limit this privilege as much as can be done consistently with the earlier admission of corporations.

How the courts employ this approach, may be exemplified by the treatment of common law trusts created under unequivocal laws and with ample corporate advantages in Massachusetts, New York, Oklahoma, and Wisconsin. Such trust "is neither in fact nor in law a corporation."<sup>17</sup> Nevertheless, because of the many attributes of a corporation possessed by this organization, it has been brought<sup>18</sup> under

<sup>13</sup> WIELAND, 1 Handelsr. 430: "Only concepts of relations enable us to understand a total thing composed of parts."

<sup>14</sup> (1870) 10 Wall. 566.

<sup>15</sup> (1900) 177 U. S. 449, cf. (1904) 193 U. S. 532.

<sup>16</sup> This mistake of WARREN, Corporate Advantages 519, 520, seems to be not yet eradicated.

<sup>17</sup> *Burgoyne v. James* (S. Ct. N. Y. 1935) 156 Misc. 859, 282 N. Y. Supp. 18.

<sup>18</sup> See Note, 34 Col. L. Rev. (1934) 1555.

such statutes as Blue Sky laws,<sup>19</sup> corporation tax laws,<sup>20</sup> and bankruptcy statutes.<sup>21</sup> It is quite consistent with the method of evaluating the impact of corporate features on a given problem, that the courts may doubt whether a statute requiring foreign corporations to obtain permission to do business, apply to such foreign business trusts as are validly constituted under their home laws. Filing has been declared unnecessary in Missouri, Montana, and New York,<sup>22</sup> but is required in Kansas, Michigan, and Washington.<sup>23</sup> The more liberal solution seems to be influenced by the idea that a common law trust is created by the mere volition of the organizers in the declaration of trust rather than as a creature of a statute. Of more persuasive force than this approach which stems from the time of the fiction theory, is the argument that, in the provisions on licensing, the New York legislature intentionally seems to have assimilated business trusts to partnerships rather than to corporations.<sup>24</sup> The contrary solution, not merely intended for fiscal interests, may well be justified by the consideration that persons dealing in the state with the trustees of a foreign business enterprise are at least as

<sup>19</sup> *Reilly v. Clyne* (1925) 27 Ariz. 432, 234 Pac. 35; cf. DUXBURY, "Business Trusts and Blue Sky Laws," 8 Minn. L. Rev. (1924) 465.

<sup>20</sup> *Tide Water Pipe Co. v. State Board of Assessors* (1895) 57 N. J. Law 516, 31 Atl. 220 (partnership association of Pennsylvania).

<sup>21</sup> *In re Associated Trust* (D. C. D. Mass. 1914) 222 Fed. 1012.

<sup>22</sup> *Missouri: Manufacturers' Finance Trust v. Collins* (1933) 227 Mo. App. 1120, 58 S. W. (2d) 1004.

*Montana: Hodgkiss v. Northland Petroleum Consolidated* (1937) 104 Mont. 328, 67 Pac. (2d) 811.

*New York: Burgoyne v. James* (S. Ct. 1935) 156 Misc. 859, 282 N. Y. Supp. 18.

<sup>23</sup> *Kansas: Home Lumber Co. v. Hopkins* (1920) 107 Kan. 153, 190 Pac. 601; *Harris v. U. S. Mexico Oil Co.* (1922) 110 Kan. 532, 204 Pac. 754.

*Michigan: Mich. Trust Co. v. Herpolsheimer* (1932) 256 Mich. 589; cf. next note.

*Washington: State v. Paine* (1926) 137 Wash. 566, 243 Pac. 2, *aff'd*, 137 Wash. 572, 247 Pac. 476.

<sup>24</sup> Both arguments have been used by Shientag, J., in *Burgoyne v. James*, *supra* n. 22, at 13, 18.

much endangered as when dealing with foreign corporations. It fits this situation well that the United States Supreme Court does not interfere with the freedom of states to treat a foreign trust either way. With its approval, a business trust of Massachusetts, whose trustees and shareholders were exempted from personal liability, after investigation of its structure, was declared clothed with the ordinary functions and attributes of a corporation and in Michigan subject to the laws relating to foreign corporations doing business in the state.<sup>25</sup>

We shall meet more examples hereafter. Although conclusions reached may not always have been satisfactory, yet the method is clear and unimpeachable. Occasions for the courts to apply their method of putting the problem continue, since statutes and judge-made rules for the most part are still conceived as if corporations and partnerships were in contradictory opposition. The treatment of mixed types still depends on a delicate balancing in accordance with the intentions underlying every one of the different statutory or other rules. Also, the sparse texts directly referring to unincorporated organizations have presented some problems of construction. At any rate, the courts recognize that their task is to construe and adjust unspecified statutes that do not squarely regulate the foreign hybrid organizations.

In this connection, attention may be drawn to the Uniform Foreign Corporations Act, § 1, which has proposed a broad assimilation for the purpose of filing for doing business:

“‘Corporations’ includes a corporation and all associations, organizations, trusts, and joint stock companies having substantially the powers or privileges of corporations not possessed by individuals or partnerships, under whatever term or designation they may be elsewhere defined and known.”

<sup>25</sup> *Hemphill v. Orloff* (1928) 277 U. S. 537, 550.



## II. PERSONAL LAW

If, then, the courts have developed an assured method of analyzing the mixed nature of business trusts, joint stock corporations, partnerships of diverse kinds, labor unions, and clubs, for the purpose of Blue Sky laws, federal revenue, state taxation, and licensing statutes, is the same approach not proper for the purpose of ascertaining the applicable law?

It seems only logical to assume that *all organizations enjoy a personal law at least to the extent that corporate attributes attach to them.*

## 1. Civil Law Doctrine

*Need for a personal law.* This problem has not been exhaustively discussed in any country and not at all in this country. European writers have, however, perceived that a personal, ubiquitous law is as necessary to foreign unincorporated organizations, including partnerships, as to veritable corporations. The status of any association ought to be determined consistently and permanently.<sup>26</sup> A careful Italian decision declares that "the need of a unitary regulation of commercial associations (*società*) in their international relations requires respect for their original constitution."<sup>27</sup>

An alternative solution would be to allow each court to determine under its domestic law the legal effects of a foreign association. Sometimes writers and courts have been inclined to apply the famous "characterization according to the *lex fori*," to determine whether a foreign association should be regarded as a legal person. But this is not a tenable proposition. As the Restatement well states in its conflicts rule

<sup>26</sup> BAR in 1 EHRENBERG'S Handb. 345; CARL WIELAND, 43 Z. Schweiz. R. (N. F.) (1924) 279; HAYMANN in 75 Jherings Jahrb. 412.

<sup>27</sup> App. Roma (March 8, 1932) Giur. Ital. 1932 I 2, 225, 227, Foro Ital. 1932 I 1173, *aff'd*, Cass. (April 29, 1933) Foro Ital. Mass. 1933, 319.

on corporations:<sup>28</sup> "Whether an association has been incorporated is determined by the law of the state in which an attempt to incorporate has been made." This implies that an association, considered a corporation in the state of charter, is considered just that everywhere. Furthermore: "The effects of an unsuccessful attempt to incorporate are governed by the law of the state in which the attempt was made." This<sup>29</sup> implies that a *de facto* corporation resulting from a defect in the process of incorporation in the state of the charter, is so recognized.<sup>30</sup> Is it possible in consistency to treat other unincorporated associations by a conflicting criterion? If it is understood, after all discussions, that the difference separating corporations, joint stock companies, and partnerships is only gradual, how can the recognition of foreign-created associations stop with corporations? A third solution has been advocated by a few writers who persist in the error of not distinguishing the problems of personal law and nationality, especially enemy nationality;<sup>31</sup> they would determine the personal law of an association according to the citizenship of its members, a senseless and often impractical approach.

*Laws and treaties.* The general European doctrine attributes to associations and partnerships, irrespective of legal personality, a personal law, determined by the same criterion as in the case of corporations, i.e., in England, the place of creation, and on the Continent, the "seat" or central office.<sup>32</sup> This rule is expressed in recent enactments such as the Polish

<sup>28</sup> Restatement § 155.

<sup>29</sup> Or subsec. 3 of § 155 and special note to § 155 drawing the same conclusion.

<sup>30</sup> United States: See annotation, 73 A. L. R. 1202; 23 Am. Jur. 67 § 56. Belgium: App. Gent (April 21, 1876) Clunet 1876, 305.

France: ARMINJON, Revue 1908, 772, 825.

Italy: App. Roma (March 8, 1932) *supra* n. 27.

<sup>31</sup> FEDOZZI, Gli enti collettivi nel diritto internazionale privato (1897) 243; CAVAGLIERI, Dir. Int. Com. 270. A similar old decision of the Swiss Fed. Trib. (Nov. 11, 1892) Clunet 1893, 640 is obsolete.

<sup>32</sup> England: General Steam Navigation Co. v. Guillo (1843) 11 M. & W.

statute on international private law, which extends its scope to "juristic persons as well as all societies and associations,"<sup>33</sup> the Code of Liechtenstein,<sup>34</sup> the *Código Bustamante*<sup>35</sup> and the new draft of the Montevideo Treaties.<sup>36</sup> Of particular significance are the provisions of international draft proposals<sup>37</sup> and bilateral treaties, such as the following:

"The expression 'companies of the High Contracting Parties' shall, for the purposes of this Treaty, be interpreted in

877; *Bank of Australasia v. Harding* (1850) 9 C. B. 661, *cf.* 2 BEALE 894 n. 3.

Austria: WALKER 149.

Belgium: POULLET § 209, 3ème règle: foreign associations put by their national law in an intermediate status between the total absence of any juristic individuality and the civil personification in proper sense will enjoy in Belgium the particular status assigned them by their national legislation.

Germany: ROHG. (February 17, 1871) 2 ROHGE. 36; LEWALD §§ 53, 65; and see the commentaries to *Handelsgesetzbuch* § 106.

Italy: BOSCO 173 (though not very clear).

The Netherlands: See 1 VAN HASSELT 315ff. including in "handelsvereeniging" the "non-juristic persons."

Switzerland: VON STEIGER, *Die Handelsgesellschaften im internationalen Privatrecht*, 67 ZBJV. (1931) at 312.

<sup>33</sup> Poland: *Int. Priv. Law*, art. 1 No. 3.

<sup>34</sup> Liechtenstein: P. G. R. arts. 676, 677.

<sup>35</sup> *Código Bustamante*, art. 249.

<sup>36</sup> Treaty on Civil Law, art. 4 par. 4 (*sociedades civiles*); on Commercial Law, art. 8 (*sociedades mercantiles*). The actual text of 1889 limits itself to juristic persons which concept in Argentina and Paraguay excludes partnerships, *cf.* ARGANA, Report on the Commercial Draft of 1940, in *República Argentina, Segundo Congreso Sudamericano* 225.

<sup>37</sup> Institute of International Law, Draft 1929, art. 5, *Annuaire* 1929 II 139, 162. Draft of Experts, League of Nations, art. 8, *cf.* Report RUNDSTEIN, *Am. J. Int. Law* 1928, Supp. 189, 191.

Ambiguous: Draft of the Geneva Sub-committee on the treatment of foreigners, *Revue* 1930, 236, 242, art. 16 § 1: "Les sociétés par actions et autres sociétés commerciales, y compris les sociétés industrielles, les sociétés financières, les compagnies assurant les communications et les compagnies de transport, ayant leur siège . . ." The draftsmen may have believed a partnership or a joint stock company necessarily to be a juristic person.

On the other hand, the treaties of the United States, e.g., with Poland (June 15, 1931) art. 11, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407, mentioning "limited liability and other corporations and associations," seem to refer exclusively to juristic persons, as also the original German version of art. 12, Treaty U. S.-Germany (Dec. 8, 1923) U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141 understands the analogous passage.

the case of either High Contracting Party as relating to the limited liability and other companies and associations (partnerships) formed for the purpose of commerce, finance, industry, transport or any other business, and carrying on business in the territories of that Party, provided that they have been truly constituted in accordance with the laws in force therein, etc." Treaty between Great Britain and Turkey, of March 1, 1930,<sup>38</sup> article 2.

"Limited liability and other companies, partnerships and associations formed for the purpose of commerce, insurance, finance, industry, transport or any other business and established in the territories of either Party shall, provided that they have been duly constituted in accordance with the laws in force in such territories, be entitled, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party." Treaty between Great Britain and Germany, of Dec. 2, 1924,<sup>39</sup> article 16, paragraph 1.

Evidently to the same effect the formula included in article 10, paragraph 1, of the Treaty between Egypt and Turkey, of April 7, 1937,<sup>40</sup> enumerates: joint stock companies, including industrial, insurance, and transport companies which have their headquarters (*siège*) in the territory, et cetera.

*Conflict with domestic classification.* The principle is obvious in the case where a partnership is considered an entity short of legal personality in the countries both of creation

<sup>38</sup> Great Britain-Turkey (March 1, 1930) 108 L. of N. Treaty Series (1930) 407 at 410, 132 British and Foreign State Papers (1930) 342.

<sup>39</sup> Great Britain-Hungary (July 23, 1926) art. 10 par. 1; 67 L. of N. Treaty Series (1927) 183 at 189, 123 British and Foreign State Papers (1926) Part I 517 at 520 (partnerships and associations).

Great Britain-Germany (Dec. 2, 1924) art. 16 par. 1, 43 L. of N. Treaty Series (1926) 89 at 98, 119 British and Foreign State Papers (1924) 369 at 374, RGL. 1925 II 777. Similarly, the German treaty with South Africa (Sept. 1, 1928) art. 15, 95 L. of N. Treaty Series (1929) 289 at 297, 128 British and Foreign State Papers (1928) Part I, 473 at 478; Finland, RGL. 1926 II 557; Italy, RGL. 1929 II 15; etc.

<sup>40</sup> 191 L. of N. Treaty Series (1938) 95.

Germany: OLG. Kassel (July 30, 1909) Leipz.Z. 1909, 954 (Swiss partnership); OLG. Augsburg (Nov. 6, 1917) 30 ROLG. 105 (Swiss limited partnership).

and of recognition. An American partnership is in fact recognized in Germany with exactly the same degree of personality and the same extent of personal liability of the partners as in the state of creation.<sup>41</sup>

The personal law applies likewise to a foreign partnership that is not a legal person under its original law, also when a similar domestic partnership is construed as a corporation. For example, a partnership of the United States is to be treated in Mexico as of the same nature it has in the United States, different from Mexican partnerships which are corporations. A German partnership or association without legal personality, an American partnership, or a *de facto* corporation should enjoy abroad its personal law, neither more nor less than at home, particularly with respect to standing in court. In the French courts, this thesis has been accepted<sup>42</sup> against opposition erroneously characterizing as procedural the French rule that only legal persons may appear in court.<sup>43</sup> Exactly the same problem exists in this country and will be discussed shortly.

The converse case of a partnership with the status of a corporation in the state of its creation is covered by the conflicts rule on corporations. The personal law prevails over a different local characterization, although eager followers of the *lex fori* theory have opposed this result.<sup>44</sup> Thus,

<sup>41</sup> Germany: RG. (Nov. 25, 1895) 36 RGZ. 393 (English partnership); OLG. Kiel (March 21, 1902) 12 Z.int.R. 469 (Swedish cooperative); OLG. Hamburg (June 6, 1904) 14 Z.int.R. 163 (American partnership), 166, *aff'd*, RG. (Oct. 7, 1904) 15 *id.* 293.

<sup>42</sup> App. Douai (Dec. 1, 1880) Clunet 1882, 317; Cour Paris (June 6, 1912) Clunet 1914, 1278 (English partnership).

<sup>43</sup> See MICHOD, 2 Personnalité Morale 328 n. 1, 345 n. 1; 2 ARMINJON (ed. 2) 538; as against 2 LYON-CAEN et RENAULT § 1126.

<sup>44</sup> RIGAUD, 10 Répert. 229 Nos. 19, 21, 22 and in some respects MELCHIOR 138; SAUSER-HALL, 50 Bull. Soc. Législ. Comp. (1921) 247. NUSSBAUM, D. IPR. 190, deciding according to the usual theory of characterization under the *lex fori*. Also BEITZKE, Jur. Personen 62, 117 advocates the law of the forum, with wrong reference to the decision of the German Supreme Finance Court, IPRspr. 1931, Nos. 15 and 16, actually confirming the conflicts rule.

if a French "*société en nom collectif*" claims in a German court the rights of a legal person as enjoyed in France, it is immaterial that common German opinion denies legal personality to an "*offene Handelsgesellschaft*"; the legal entity is recognized in conformity with French law.<sup>45</sup> A partnership constituted by two British subjects in Czarist Russia was a legal person under the local law; therefore the liability of the partners to a German creditor was declared dependent on the Russian law by the Anglo-German Mixed Arbitral Tribunal.<sup>46</sup> Likewise, the Belgian law of October 25, 1919 (article 8) allows foreign scientific associations to "exercise in Belgium . . . the rights resulting from their national law." The Swiss authorities recognized German private limited companies (*Gesellschaften mit beschränkter Haftung*) at a time when Switzerland had not yet introduced this type,<sup>47</sup> and now grant full acknowledgement to English stock companies, corporations sole and business trusts, all unknown to Swiss internal law.<sup>48</sup>

The following case of the Italian Supreme Court gives another confirmation:

*Illustration: Nizard v. Finanza.*<sup>49</sup> Two brothers Nizard, intending to form a partnership, established a firm in France but omitted the prescribed publications. The resulting irregular or *de facto* partnership is considered a merely contractual relationship in France,<sup>50</sup> while it would be an effective corporation in Italy.<sup>51</sup> After the death of one of the brothers, taxes were levied on certain assets situated in Italy and

<sup>45</sup> Germany: LEWALD 48; GEILER, 12 Mitteilungen dt. Ges. Völker R. (1833) 186; M. WOLFF, IPR. 69 n. 1 and Priv. Int. Law 306.

<sup>46</sup> Anglo-German Mixed Arb. Trib., Voith Maschinenfabrik und Giesserei v. Thornton & Geiler, 8 Recueil trib. arb. mixtes 300.

<sup>47</sup> Swiss Dept. of Justice (Nov. 25, 1898); Decision of the Federal Council (June 16, 1902) BBl. 1902 IV 42.

<sup>48</sup> SAUSER-HALL, 50 Bull. Soc. Législ. Comp. (1921) 246.

<sup>49</sup> Italy: Cass. (April 29, 1933) Foro Ital. 1933 I 1160.

<sup>50</sup> France: Cass. (req.) (Feb. 8, 1932) Clunet 1932, 961.

<sup>51</sup> Italy: Cass. (Dec. 22, 1931) Foro Ital. 1932 I 716, 936.

brought into the *société*. The legality of such taxation was dependent, in the opinion of the courts, on the question whether the assets were owned by the brothers in joint tenancy or by the firm. The courts correctly resorted to the personal law of the association and found it to be that of the central office and principal place of business in France rather than the law of the situs or the national law of the partners.

A learned French commentator on this case reveals his perplexity, that the association has not been characterized according to the *lex fori* as required in conflicts problems, but consoles himself with thinking that the decision of the court could be supported by reference to the law of aliens rather than conflicts law.<sup>52</sup> Yet, the ascertainment of the personal law of foreign organizations is by no means a problem of "*condition des étrangers*" but a part of regular conflicts law.

In a case where in the name of an intended stock corporation, during the period of preparation for its incorporation, contracts were concluded with third parties, the German Reichsgericht has applied the personal law of the future corporation, since the main office was to be established in Germany. Under this law, namely, the German law, the promoters were considered to be an unincorporated association, and the agents were personally liable.<sup>53</sup> It would have been more correct to ascribe to the promoting syndicate its own personal law, with probably the same result. The principle ought to be the same as where a limited company was intended, with the central office being established in Bombay, India, but because not registered there, considered a partnership according to Anglo-Indian law.<sup>54</sup>

An exception made by the Belgian Supreme Court was not a happy one. The court really did not doubt that the

<sup>52</sup> MAURY, Note in 3 *Giur. Comp. DIP.* 23.

<sup>53</sup> RG. (October 29, 1938) *JW.* 1939, 110.

<sup>54</sup> OLG. Hamburg (Jan. 21, 1932) *Hans.GZ.* 1932, B 266 No. 73, *IPRspr.* 1932 No. 14.

capacity of the *Société des Droits d'Auteurs et Compositeurs de Musique* (SACEM) of Paris was subject to French law but thought that article 1832 of the Civil Code, common to France and Belgium, should receive the Belgian interpretation rather than the French so as to deny legal personality to a *société civile*.<sup>55</sup> A strange view. The law presiding over the creation of an association should be exactly applied without interference of the municipal law, whether it grants more or less autonomy. The mistake is instructive. Also common law courts have not hesitated at times to apply their own special construction to an association organized in another state under common law; we shall encounter immediately such a decision.

## 2. American Law

(a) *Quasi corporations*. Apart from general partnerships, it seems to me that, although no unequivocal commitment to a formulated rule can be ascertained, practically the law under which a limited partnership, a business trust, or a joint stock corporation has been organized, clearly forms the law determining the extent of its corporate advantages. The above-mentioned examinations of business trust relations have led to the clear conclusion that New York courts have "fully recognized the status of a business trust" as reflected in the decisions of the Massachusetts courts.<sup>56</sup> A Michigan limited partnership association was thoroughly analyzed by the Supreme Court of California, which found that under the Michigan statute, the association had so many corporate powers that it should be deemed a foreign corporation at least for the purpose of the power to hold and convey real

<sup>55</sup> Cass. Belge (November 12, 1935) 3 *Giur. Comp. DIP.* No. 131. *Contra*: ILLCH, *ibid.*

<sup>56</sup> *Burgoyne v. James* (1935) 156 Misc. 859, 282 N. Y. Supp. 18; *Textile Properties v. Whittall Ass.* (1934) 157 Misc. 108, 282 N. Y. Supp. 17.



property in the firm name,<sup>57</sup> a power which was denied to partnerships by California law. Where a limited partnership was organized in Cuba under Spanish law to the effect that a special partner was not personally liable with his separate assets for firm debts, the New York Court of Appeals applied Spanish law, although the contract sued upon was made in New York on behalf of the firm.<sup>58</sup> This decision has been incidentally approved in the Restatement<sup>59</sup> and has several parallels.<sup>60</sup> It was not even mentioned that the Cuban organization, which must have been a *comandita simple*, would be construed as a legal person in Cuba itself. The case, therefore, has a broad scope. In a later case, a New York unincorporated stock company was found to be a legal entity "for most, if not all practical purposes, capable in law of acting and assuming legal obligations quite independent of the shareholders," a "quasi-corporate entity," very unlike an ordinary copartnership.<sup>61</sup> As a result, capacity for issuing negotiable bonds was recognized. In Kansas, it has been held that a common law trust domiciled in Oklahoma has legal capacity to acquire a royalty interest in lands located in the state, in assimilation to corporations endowed with this power under the state constitution.<sup>62</sup> The status of an organization called "The Farmers Association of North Mississippi" was analyzed according to the law of the state of Mississippi where the members resided, and held not to constitute a partnership.<sup>63</sup>

<sup>57</sup> Hill-Davis Co., Ltd. v. Atwell (1932) 215 Cal. 444, 10 Pac. (2d) 463.

<sup>58</sup> King v. Sarria (1877) 69 N. Y. 24, 25 Am. Rep. 128.

<sup>59</sup> Restatement § 343 comment c.

<sup>60</sup> Barrows v. Downs (1870) 9 R. I. 446, 11 Am. Rep. 283: in a contract "considered as made in New York" by the general partner of a Havana partnership, his authority to bind special partners is "regulated by the law of Cuba"; Lawrence v. Batcheller (1881) 131 Mass. 504, 509: "all persons doing business with limited partnerships are presumed to take notice of the laws of the State in which they are formed." See moreover cases *infra* ns. 82-86.

<sup>61</sup> Hibbs v. Brown (1907) 190 N. Y. 167, 82 N. E. 1108.

<sup>62</sup> Fitch v. United Royalty Co. (1936) 143 Kan. 486, 55 Pac. (2d) 409.

<sup>63</sup> Price v. Independent Oil Co. (1933) 168 Miss. 292, 150 So. 521.

It is true that some decisions seem to indicate opposite tendencies. But they belong to two classes of special considerations.

One class seems to be represented by only one case. An attempt had been made to form a business trust in Texas, the members contracting that no stockholder should be personally liable. By the law of Texas, the stipulation was invalid, and a partnership resulted with personal liability of the members. The plaintiff brought an action in Iowa on a note issued by the "trustees" of the association, against an Iowa resident who had bought stock in the organization. The Iowa Supreme Court surprisingly dismissed the action on the ground that public policy required the application of Iowa law under which the organization is considered an unincorporated joint stock association.<sup>64</sup> The decision has been criticized on several grounds.<sup>65</sup> It commits inversely the mistake made in the California provisions which held a shareholder personally liable under California law, contrary to the law of the charter.<sup>66</sup> These applications of the *lex fori* vary the personal law without any possible justification.

As this case seems to suggest, the controversies about the nature of a common law trust have somewhat confused the issue. In contrast to the courts of Massachusetts, other jurisdictions such as Kansas and Texas have considered that corporate advantages such as limited liability of stockholders or the concentration of the power of management should not be attributed to an organization otherwise than by statute or by a distinct agreement in the individual contracts made by the trustees with third persons. Writers once correctly relied on the conflicting considerations for the support of their own respective opinions, so long as the law was fluid. But when a

<sup>64</sup> *Farmers' & Merchants' Nat'l Bank v. Anderson* (1933) 216 Iowa 988, 250 N. W. 214.

<sup>65</sup> Note, 47 Harv. L. Rev. (1934) 526.

<sup>66</sup> *Supra* p. 81.

doctrine has become stabilized by the court practice or statute, it is a part of the general law of the state.<sup>67</sup> Massachusetts law on the one hand, Texas law on the other, ought to be recognized exactly as they are. There is no occasion for Iowa or California to supply its own theory. That the established judge-made law of Massachusetts, for instance, should not have been able to work out a trust susceptible of being recognized in Kansas, whereas its subsequently enacted statute should be given effect, is one of those apparently immortal dogmas loved by some writers and too unreasonable to be really adopted by any court.

Of another character, however, are cases in which it was stressed that the association had acted under the color of a corporation. A limited partnership of Pennsylvania filed an application for doing business in New York, referring to its "corporate seal" and indicating an agent for service of process. The New York court, without entering into an examination as to what was the true status of the party under the law of creation, upheld the service upon the New York agent authorized by the application mentioned. The plaintiff otherwise "would have been misled." This is an interesting exception to be connected with territorial protection of third persons.<sup>68</sup>

A similar idea has been expressed in a California case.<sup>69</sup> An organization, having vainly attempted to incorporate elsewhere, conducted business in the state "in garb of a corporation inducing the transaction involved in the instant litigation." It was considered estopped to deny the legality of its organization, and treated as a *de facto* corporation under the

<sup>67</sup> Also in the field of the Full Faith and Credit Clause, primarily not in question here, the traditional doctrine that judicial decisions are not a part of the public acts protected by the clause seems to vanish; see MORGAN, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1944) 153, 167 and n. 31.

<sup>68</sup> Wolski v. Booth & Flinn, Ltd. (1916) 93 Misc. 651, 157 N. Y. Supp. 294.

<sup>69</sup> Charles Ehrlich & Co. v. J. Ellis Slater Co. (1920) 183 Cal. 709, 192 Pac. 526.

laws of California. On the other hand, the Iowa Supreme Court permitted an Illinois *de facto* corporation to sue on the ground that a domestic *de facto* corporation could do so,<sup>70</sup> instead of inquiring into the law of Illinois,<sup>71</sup> the state of creation, as is normally,<sup>72</sup> although not always, done.<sup>73</sup>

Such cases remind us of the reverse side of recognition. Reciprocal application of the personal law may cause some concern where misrepresentation is to be feared. But this is a general consideration needing separate and comprehensive discussion in the future.

(b) *Partnerships*. The question is considerably more difficult with respect to partnerships, because the approach implicitly accepted in the Restatement seems generally to be in the mind of lawyers. It is this: partnership means the partners; whenever a contract is made on their behalf, the ordinary rules of agency apply and, since the power of an agent to make his principal liable is said to depend on the law of the place where the contract with the third party is made, it is this law which governs the external situation of a partnership. In a few old decisions, the law of the place where a partner contracts with a third party, clearly has been extended to the problem of liability of other partners.<sup>74</sup> Some authors, in fact, take it for granted that a partnership is devoid of a personal law.<sup>75</sup> Can it be, however, that one partner A, contracting in some jurisdiction on behalf of the partnership or

<sup>70</sup> First Title & Securities Co. v. U. S. Gypsum Co. (1931) 211 Iowa 1019, 233 N. W. 137.

<sup>71</sup> Note, 79 U. of Pa. L. Rev. (1931) 634, 635.

<sup>72</sup> Thus in Illinois: Hudson v. Green Hill Seminary (1885) 113 Ill. 618 (Indiana *de facto* corporation); Concord Apartment House Co. v. Alaska Refrigerator Co. (1898) 78 Ill. App. 682.

<sup>73</sup> See Restatement New York Annotations §155.

<sup>74</sup> Restatement § 134 No. 1; Baldwin v. Gray (La. 1826) 4 Mart. N. S. 192, 16 Am. Dec. 169; Ferguson v. Flower (La. 1826) 4 Mart. N. S. 312; Bank of Topeka v. Eaton (1899) 95 Fed. 355; Alexandria A. & Ft. S. R. Co. v. Johnson (1900) 61 Kan. 417, 59 Pac. 1063.

<sup>75</sup> See, for instance, CRANE, "Conflict of Laws under Partnership Acts," 66 U. of Pa. L. Rev. (1918) 310, 314; also DICEY, Rule 140.

even of partners A, B, C, may make partner C liable beyond the rules under which the partnership has been organized, without any cause other than the local law regulating *domestic* organizations? The confusion wrought is evident. The extent of a power of attorney, under certain conditions (to be discussed in the next volume), is governed by the law of the place where the agent acts. This rule may affect an obligation of the partnership. But what effect such an obligation has on the liability of the various persons, inherent in the partnership, with their own assets is determinable by another law, governing in reality the structure of the organization.

Indeed, it has been said that the liability of partners is determined by the state of the domicil or origin of the partnership.<sup>76</sup> The cases speak of the place of origin,<sup>77</sup> the place where the partners are domiciled,<sup>78</sup> or where they carry on their business.<sup>79</sup> None of these cases, it is true, clearly recognizes a constitutive law of the partnership. They rather argue, more or less distinctly, on the basis of the conflicts rules concerning contracts. Likewise, the Restatement calls for the law of the place where the partnership agreement is made to determine the liability of a special limited partner.<sup>80</sup>

Yet we have mentioned before a case involving Cuban special partners, decided in New York under Cuban limited partnership law. Also, this choice of law allegedly rested on the fact that the partnership agreement was made and performable in Cuba. Nevertheless, the court compared the prob-

<sup>76</sup> Thus BURDICK, *Law of Partnership* (ed. 3, 1917) 14 on the ground of *Easton v. George Wostenholm & Son* (C. C. A. 9th 1905) 137 Fed. 524.

<sup>77</sup> *Cameron v. Orleans & Jefferson R. Co., Ltd.* (1902) 108 La. 83, 101, 32 So. 208, 215.

<sup>78</sup> *Wilson v. Todhunter* (1918) 137 Ark. 80, 207 S. W. 221; *Barker v. U. S. Fidelity & Guaranty Co.* (1917) 228 Mass. 421, 426, 117 N. E. 894, 896.

<sup>79</sup> *Barker v. U. S. Fidelity & Guaranty Co.* (1917) 228 Mass. 421, 426, 117 N. E. 894 at 896; *First National Bank of Waverley v. Hall* (1892) 150 Pa. 466, 24 Atl. 665.

<sup>80</sup> § 343 comment c; 2 BEALE 1194 § 345.1.

lem with the formation of a marriage relation and the acquisition of property in a foreign country. The difference from an ordinary obligatory contract was obviously felt.

All the analogies above discussed make the conclusion inevitable that partnerships also may have a personal law.

### 3. Contacts

(a) *Law of the seat.* In civil law countries referring to the law of the state of the "seat" as applicable to corporations, it is the dominant opinion that the seat principle governs also all other private associations.<sup>81</sup> Commercial partnerships are included, since they have necessarily a head office, at which they have to register. Noncommercial societies are included if they have a seat.<sup>82</sup>

The nationality and domicile of the partners, therefore, are immaterial. A partnership domiciled abroad is foreign, even though all partners be subjects of the forum, and is domestic, even though all be foreigners.

(b) *American quasi corporations.* In American cases, equally, it is not rare to find applied the law of the state where an associated body has been organized. The cases speak of "a common law trust domiciled in Oklahoma,"<sup>83</sup> or "determined by the law of Massachusetts where it is located,"<sup>84</sup> "created in Massachusetts,"<sup>85</sup> "a limited partnership organized under the Act of Pennsylvania,"<sup>86</sup> et cetera. It

<sup>81</sup> WIELAND, 1 Handelsr. § 51 n. 18, and 43 Z. Schweiz. R. (N. F.) (1924) 278, 279 n. 139; E. HEYMANN, 75 Jherings Jahrb. (1925) 413; LEWALD, 7 Répert. 319; NUSSBAUM, D. IPR. 206; RUNDSTEIN, "Report on Draft of Experts," art. 8, Am. J. Int. Law 1928, Supp. 189, 191; FRAGISTAS (Greece), 10 Z.ausl.PR. (1936) 638. *Contra*: for the state of constitution, Inst. Dr. Int., Proposals, art. 5, see Annuaire 1929II 302.

<sup>82</sup> GEILER in 1 Düringer-Hachenburg 49 contends that, even if they have no seat, the law under which the organization is made would apply.

<sup>83</sup> Fitch v. United Royalty Co. (1936) 143 Kan. 486, 55 Pac. (2d) 409.

<sup>84</sup> *In re Associated Trust* (D. C. D. Mass. 1914) 222 Fed. 1012, 1013.

<sup>85</sup> Bartley v. Andrews (1923) 202 N. Y. Supp. 227, 208 App. Div. 702.

<sup>86</sup> Great Southern Fire Proof Hotel Co. v. Jones (1900) 177 U. S. 449.

seems that the places of organizing and of domicile are not distinguished in determining the applicable law; this would be analogous to the treatment of incorporated bodies, where the domicile is legally deemed to be in the state of incorporation.

(c) *American general partnerships*. The question is of more serious significance with respect to partnerships. Since these have not yet been recognized in the United States as bearers of personal law, the courts have been uneasy in defining the law governing their structure.<sup>87</sup> Almost never has the problem been squarely posited. The cases generally suppose a partnership carried on in the same state as that in which it was constituted.<sup>88</sup> One case only is known in which a partnership was formed in one state, Pennsylvania, and carried on in another, New York; the Supreme Court of Pennsylvania regarded the partnership as governed by the law of New York.<sup>89</sup> And this was on the ground that New York was the place of performance.<sup>90</sup>

This situation calls for clarification. Partnerships may have to be construed under foreign laws. Within the United States, many states have adopted the Uniform Partnership Act and many have not. What organizations are those made "under the Act?"<sup>91</sup> In this case, any pretension that only statutory law can bestow corporate attributes would be beside the point; there is a statute.

<sup>87</sup> See *supra* p. 112.

<sup>88</sup> *King v. Sarria* (1877) 69 N. Y. 24, 25 Am. Rep. 128; *In re Hoyne* (1922) 277 Fed. 668; *Cutler v. Thomas* (1852) 25 Vt. 73; *Wilson v. Todhunter* (1918) 137 Ark. 80, 207 S. W. 221, *cf.* 47 C. J. 717, Partnership § 117.

<sup>89</sup> *First National Bank of Waverly v. Hall* (1892) 150 Pa. 466, 24 Atl. 665, *cf. supra* n. 79.

<sup>90</sup> 2 BEALE 1192 observes that the result would have been the same under the *lex loci contractus*.

<sup>91</sup> *Cf. In re Hoyne* (1922) 277 Fed. 668: whether a partnership was validly made was determined under the Illinois Act, since the contract was executed and the business conducted in Chicago.

What is in issue is the question, which contact should prevail in case of divided local attachments: the place where the contract of partnership is "consummated" or "launched," or the place where the carrying on of business is centered, the domiciliary seat. The Continental doctrine leans on the latter contact, and it may be said in its favor in the absence of registration that third persons have a much better opportunity to know the location of the actual headquarters than the place where a contract was once made. Common law habits, contented with mere incorporation and not ascribing importance to the principal management, are not concerned with unincorporated organizations. On the other hand, difficulties in ascertaining the main business place may occur in some rare cases or irregular companies,<sup>92</sup> but not frequently in any group of organizations. That a partnership cannot have a domicil,<sup>93</sup> is an empty assertion. Of course, ordinary partnerships in this country, as contrasted with limited partnerships, need not necessarily have any fixed business place and have no duty of registration, which was one of the chief reasons for excluding their construction as legal persons.<sup>94</sup> But in practice there will be found few partnerships showing no central office in their letterheads, and a great many of considerable, if not gigantic, proportions whose business is comparable to that of big corporations.

### III. SCOPE OF PERSONAL LAW

#### 1. General Aspects

It is not difficult to define the domain of the personal law of quasi-corporations, whose distinctive elements are so prevalent in most *de facto* corporations, in the limited partner-

<sup>92</sup> NAVARRINI, Note, *Foro Ital.* 1927 I 585.

<sup>93</sup> This assertion of the Restatement § 41 comment d has been challenged by Restatement New York Annotations 23.

<sup>94</sup> LEWIS, 29 *Harv. L. Rev.* (1915) 158 at 167.



ships of Pennsylvania or Michigan, and in the common law trusts of Massachusetts or New York. The border line runs exactly where the contractual features replace the corporate. The question, for instance, whether a special partner in a limited partnership, as an ordinary creditor, may request satisfaction out of the partnership funds for loans or goods sold, in competition with strangers, is closely connected with the structure of the organization,<sup>95</sup> and hence, it ought to be covered by the law governing such organization. But if an unincorporated joint stock company is constituted in such a way that it discontinues in case an associate dies or is adjudged a bankrupt, and company debts are incurred after the death of an associate, the legal problems arising should be referred to the ordinary law of contracts; whether an associate paying the debt has recourse for reimbursement from the executor, may be determined by the law governing the preliminary agreement or the contract of association, not by that of the place of the company domicil.

The subject seems not to have found any attention thus far and would deserve a special study.

## 2. Partnership

The Continental doctrine extends its principle to all incidents of organization of mercantile partnerships. The law of the place where a partnership has its head office, therefore determines in particular the constitution of the partnership, so as to render defects in its creation under the personal law open to attack everywhere;<sup>96</sup> the distinction between property of the partnership and separate property of the partners;<sup>97</sup> powers of the partnership<sup>98</sup> including its capacity for being

<sup>95</sup> Cf. WARREN, *Corporate Advantages* 319, 323.

<sup>96</sup> DIENA, 1 *Dir. Com. Int.* 287.

<sup>97</sup> App. Roma (March 8, 1932) *supra* p. 100 n. 27.

<sup>98</sup> 36 RGZ. 354; OLG. Kassel, Leipz. Z. 1911, 616 n. 2; KOHLER, 74 Z. Handelsr. 459.

a party to a law suit;<sup>99</sup> transfer and seizure of the rights of partners;<sup>100</sup> the authority of partners to obligate the partnership;<sup>101</sup> the liability of partners to third parties<sup>102</sup> and whether such liability is limited, joint, or joint and several.

The last application, concerning the conditions of the partners' liability, is consistently followed by the courts of France, Germany, the Netherlands, and other countries and has been clearly adopted also in the English leading case of *General Steam Navigation Co. v. Guillou*.<sup>103</sup> The court in this case, however, distinguished two questions: (1) one substantive, whether French law governing the partnership imposed upon the defendant joint liability or no liability, to which question the court was ready to apply the French answer; and (2) one procedural, whether in the French courts the defendant would have to be sued jointly with the other shareholders of the company, which mode of procedure was declared to be inapplicable in an English court. This distinction was applied to objectionable use in this and particularly in a later case.<sup>104</sup> In the latter, the court declared bad

<sup>99</sup> See *infra* p. 119.

<sup>100</sup> On the French sequestration of the trade mark "Chartreuse" after dissolution of the Congregation of Chartreux, see citations by NUSSBAUM, D. IPR. 208 n. 1.

<sup>101</sup> ROHG. (Feb. 17, 1871) 26 Seuff. Arch. No. 101 (speaking indiscriminately of foreign-constituted general partnerships).

<sup>102</sup> Germany: AG. Celle (May 31, 1876) 31 Seuff. Arch. No. 303 (debt of a partnership in Lima, Peruvian law applied to the liability of a partner domiciled in Germany); RG. (Jan. 2, 1920) Hans. RZ. 1920, 214 No. 35, affirming OLG. Hamburg (May 27, 1919) *id.* 1920, 87 No. 9: partners domiciled in Bremen, of a partnership domiciled in Texas, are liable to third parties, having contracted with the firm, only in accordance with the law of Texas. This was distinguished from the German law governing the contract itself. For other decisions see LEWALD 54 § 65.

French-Hungarian Mixed Arb. Trib. (Feb. 27, 1929) Rothstein et Cie. v. Appel, 9 Recueil trib. arb. mixtes 105 (Austrian creditor of a French partnership). French-Bulgarian Mixed Arb. Trib. (July 8, 1929) Melian v. Diloff Frères, 9 Recueil trib. arb. mixtes 287 (French creditor of a Rumanian partnership). In both cases it was emphasized that in addition to the firm, each partner was liable jointly and severally.

<sup>103</sup> (1843) 11 M. & W. 877; cf. CHESHIRE 649; and see *supra* n. 8.

<sup>104</sup> Bullock v. Caird (1875) 10 Q. B. 276 apparently approved by LINDLEY,

the plea of the defendant partner of a firm domiciled in Scotland that the firm was distinct from the members and that a judgment against the firm was a condition precedent to individual liability. But the character of a Scotch partnership as a distinct person was notorious and since has been confirmed by the Partnership Act of 1890.<sup>105</sup> This should have been recognized in England with all its attendant effects on marshalling the liabilities of company and members. The privilege of being sued only after the principal debtor has been sued and his assets exhausted (*beneficium excussionis*) is an incident to liability of partners, as German courts confirm,<sup>106</sup> notwithstanding the opposed English view.<sup>107</sup>

The law of the seat has been said also to include the reciprocal rights of the partners, with the proviso that this may be changed by the intention of the parties.<sup>108</sup> But the Reichsgericht in a case of two German-domiciled partners carrying on business in Portugal, had no hesitation in assuming that application of German law was intended by the parties.<sup>109</sup> On the other hand, by a distinct mistake in a draft of the Institute of International Law, all incidents, including conditions of constitution, relations among associates and toward third parties, dissolution and liquidation, have been lumped together and subjected to the law of the seat by presumptive intention of the parties.<sup>110</sup> It should be contended, instead,

Partnership (ed. 10, 1935) 255 (0), 718 (1); 3 BEALE § 588, 2, but see the criticism by YOUNG 179; M. WOLFF, Priv. Int. Law 243 § 224.

<sup>105</sup> § 4 (2).

<sup>106</sup> OLG. Dresden (Feb. 2, 1916) 38 Sächs. Arch. 94; LEWALD 54; STEIN-JONAS, ZPO. § 50 VI.

<sup>107</sup> *In re Doetsch*, Matheson v. Ludwig (1896) 2 Ch. D. 836; cf. Partnership Act, 1890, § 9, LINDLEY, Partnership (ed. 10, 1935) 255 (0), 718 (1).

<sup>108</sup> Germany: RG. (January 30, 1889) 23 RGZ. 31; Bay. ObLG. (May 26, 1902) 3 Bay. ObLGZ. 446; LG. Karlsruhe (March 11, 1909) 19 Z.int.R. 525, Clunet 1910, 1256; RG. (May 22, 1911) Leipz.Z. 1911, 616; FICKER, 4 Rechtsvergl. Handwörterbuch 470; GEILER in 1 Düringer-Hachenburg 49.

<sup>109</sup> RG. (February 27, 1931) Hans.RGZ. 1931 B 295 No. 105. Perfectly in accord, Bay. ObLG. (November 5, 1921) 27 Bay. ObLGZ. 187 No. 71 (partnership in Russia).

<sup>110</sup> New York Meeting, Annuaire 1929 II 302, art. 5. As the discussion at

that the personal law is independent of intentions of the parties but does not cover the internal relations of associates in any kind of partnership, because they are not characterized by corporate features. They are entirely subjected to contractual conflicts rules, and it is only casually that the applicable law often coincides with that of the center of the business,<sup>111</sup> or, for that matter, the place where the business started.

The American partnership cases, due to their general attitude, cannot offer a direct contribution to this problem.

### 3. The Right to Be a Party

Following the principle of the personal law and at the same time conceiving the right to be a plaintiff or defendant as substantive, the Continental doctrine states that the law of the principal business place determines this right. The prevailing theoretical approach is the same as in construing rights and duties of partnerships in general; the members in their particular joint relationship are the parties.<sup>112</sup> Accordingly, the members of an English partnership may sue under the name of their firm on the Continent,<sup>113</sup> because they may do so according to English procedure, although in the English conception the proceeding is more closely connected with the individuals than on the Continent. By the same

163ff. shows, there was no real agreement; in addition, the enlarged role of party autonomy clashed in the proposal itself with the prejudice against party autonomy.

<sup>111</sup> To this effect, probably Anglo-German Mixed Arb. Trib., Samson v. Heilbrun (June 27, 1929) 9 Recueil trib. arb. mixtes 36: a partnership consisting of an English and a German national, dissolved by art. 299 (a) of the Treaty of Versailles, is subjected to Scottish Law with respect to the relations between the partners resulting from a dissolution not followed by agreement or winding up procedure.

<sup>112</sup> See WIELAND, 1 Handelsr. 420 and n. 61.

<sup>113</sup> France: App. Douai (Dec. 1, 1880) Clunet 1882, 317.

Germany: RG. (November 25, 1895) 36 RGZ. 393.

The Netherlands: Rb. Roermond (May 3, 1934) N. J. (1935) 253. See 11 Zausl.PR. (1937) 215 No. 93 (*contra*: No. 92 *ibid.*)

token, a New York partnership has been held in Germany incapable of being a party.<sup>114</sup>

In the United States, however, the problem presents peculiar difficulties. The reasons are various, including the doctrines that, at common law as contrasted with statute, only legal entities may sue and be sued; that statutory authorizations to associations lacking personality are of procedural character; and that common law courts refuse representative actions in such situations.<sup>115</sup>

These arguments imply that the state of creation has not elevated these types to the rank of corporations in the meaning of the forum, although they are perfectly capable of suing at home. The courts embark on a thorough analysis of the status of the unincorporated associations according to the law of the state where they have been organized, but the decision finally depends on whether the specific mixture of corporate and noncorporate elements justifies classifying the association as a corporation in the sense of the forum.

Such reasoning evidently is grounded in traditional conceptions. It should be noticed, however, that the application of these conceptions to *foreign* associations obscures their legal structure and causes a great deal of unnecessary delay and difficulty,<sup>116</sup> even though in some cases careful lawyers may avoid these problems by adjusting matters to special devices of the local procedure. The entire argument amounts to a requirement that other states should not equip organizations in a manner different from the forum. The very investigation into attributes other than the right to sue, in order to ascertain the right to sue, shows how inadequately the problem is handled. Joint stock companies established under

<sup>114</sup> OLG. Hamburg (June 14, 1904) 9 ROLG. 25.

<sup>115</sup> STURGES, "Unincorporated Associations as Parties to Actions," 33 Yale L. J. (1924) 383-405.

<sup>116</sup> See STURGES (*supra* n. 115) at 404.

the statutes of New York, Pennsylvania, or Michigan are "difficult to distinguish" from corporations.<sup>117</sup> Why must they be distinguished at any cost, for the purpose of denying them the very right to sue that they have in their home state?

Of course, the real theoretical trouble lies in the dogma that the right to be a party is procedural. As in many other respects, the development of American law requires a definite departure from the overextended scope of procedural law. In the meantime, we may draw some comfort from a recent concurring vote of Mr. Justice Frankfurter. The Federal Rules of Civil Procedure have expressly dealt with unincorporated associations, but they did it under a congressional authority confined to procedural matters. Therefore, it is the official view of the United States Supreme Court that, as Mr. Justice Frankfurter declares, suability of trade unions is "in essence and principle a procedural matter." The federal rule allows a trade union to be sued in its common name if the local law allows this, a question possibly resolved by the local procedural law. "But if such a procedural matter may be cast in the form of a substantive issue for the determination of status, it would at least in this case, be a question of the substantive law of the District [the local law of the case at bar] and not raise any substantive issue of federal law."<sup>118</sup> In other words, the law of a state may treat the problem as substantive, an incident of the personal law; this will be enough for the federal court to recognize suability on its allegedly procedural level.

It seems to follow that American courts, irrespective of their own characterization, ought to apply the personal law of foreign countries, including suability as an incident, and consistency requires that this liberalism should extend to the

<sup>117</sup> BALLANTINE 15.

<sup>118</sup> *Busby v. Electric Utilities Employees Union* (1944) 65 S. Ct. 143.

laws of sister states, endowing associations or partnerships with the substantive right to sue or be sued.

Occasionally, it has been noted that New York courts may be liberal in entertaining suits against unincorporated associations, because they have a special procedure provided by their statutes.<sup>119</sup> It should be replied that any procedure good for citing a corporation is good to use against any nonincorporated group which has articles of organization implying its suability under the applicable law.

Finally, if an action at law can be instituted against a corporation, there is no reason other than the mere weight of a tradition cancelled by economic necessity, to prevent a similar action against any organization endowed with the capacity of being sued by its personal law.

#### IV. QUASI NATIONALITY OF PARTNERSHIPS

How to apply the various rules affecting foreigners to unincorporated associations, particularly partnerships, again depends on the infinitely differentiated purposes of these rules.<sup>120</sup> Neither can partnerships be simply assimilated in all respects to corporations, although they enjoy many benefits of the latter and are now often included in the treaties protecting business organizations, nor are they entirely incapable of being treated as entities.

There is no fixed rule including all matters such as security for costs, jurisdiction, taxation, and the like, valid for all countries.<sup>121</sup>

On the other hand, nationality of partnerships in the

<sup>119</sup> Note, 34 Col. L. Rev. (1934) 1555, 1556.

<sup>120</sup> French Cass. (civ.) (July 25, 1933) Gaz. Pal. 1933.2.502 states that although a partnership is invested with the attributes of a legal unit in France, such concept cannot be transferred without qualification to the domain of public law, and in particular a partnership composed of foreigners may not claim compensation for war damage according to the principles of private law. Other decisions had decided the particular issue to the contrary, especially Cass. (req.) (July 17, 1930) Revue 1931, 128.

<sup>121</sup> For instance, Austria: Law on Jurisdiction (*Jurisdiktionsnorm*) § 75 (administrative seat), cf. WALKER 149.

meaning of the peace treaties of 1919 dealing with the clearing of prewar debts should not have been denied. The Anglo-German Mixed Arbitral Tribunal held for dogmatic reasons that an English or German partnership was not an English or German national in the meaning of the Treaty provisions concerning prewar debts. Hence, the nationality of the single partners was decisive for their participation in claims and debts, upon the application of the clearing and valorization rules.<sup>122</sup> This theory was wrongly deduced from the overestimated fact that partnerships are not legal persons in every and all respects, in disregard of the essential corporate attributes they undoubtedly have and of the various purposes for which they have always been considered connected with the several countries. In fact, the view of the Tribunal was entirely impractical.<sup>123</sup>

Belgium: Cass. (Nov. 5, 1906) Clunet 1907, 808 (center of operation, for tax purposes).

France: 2 ARMINJON (ed. 2) 491 § 194.

Germany: Nationality has been ascribed to partnerships for the purposes of restricting the provisions of the HGB. to domestic partnerships, RG. (Feb. 11, 1896) 36 RGZ. 172, 177; RG. in Leipz.Z. 1911, 616; the duty of advancing security for the costs of a lawsuit, OLG. Hamburg, DJZ. 1900, 444; STEIN-JONAS, 1 ZPO. (ed. 5, 1934) § 110 I 11 c. (36 RGZ. 393, 396 is obsolete), cf. STAUB-PINNER in 1 Staub 647 § 105 n. 45, for general jurisdiction (13 OLG. 73). Cf. WIELAND, 1 Handelsr. 419 n. 57, 617-19 § 18. On the other hand, a Venezuelan partnership is recognized as a juristic person, but the German partners are treated for tax purposes as the members of a German partnership. Reichsfinanzhof (Feb. 12, 1930) 27 Entsch. (of this court) 73, and JW. 1931, 160 with critical note by RHEINSTROM.

Italy: Cass. (April 29, 1933) Foro Ital. Mass. 1933 IV 319: a French "irregular company" treated for taxation as not being a unity according to French law.

Switzerland: SCHNITZER, Handelsr. 159.

The Netherlands: Rb. Rotterdam (June 24, 1914) W. 1915, 9719, 3 (a unit for jurisdiction); Rb. Amsterdam (Dec. 19, 1924) W. 11346 (a French partnership of an English and a French national has to give security for costs in respect to the English partner only, although it is held to be a legal unit in the French doctrine).

<sup>122</sup> Fisher & Co. v. Biehn and Max (March 22, 1922) 3 Recueil trib. arb. mixtes 12, JW. 1922, 1161; Hardt Co. v. Stern (March 23, 1923) 3 Recueil trib. arb. mixtes 12, 2 Friedensrecht 72.

<sup>123</sup> RABEL, JW. 1922, 1162; HERM. ISAY, 3 Abhandlungen zum Friedensrecht (1923) 25; *id.*, Private Rechte und Interessen im Friedensvertrag (ed. 3, 1923) 57; R. FUCHS, 3 Mitteilungen dt. Ges. Völker R. (1922) 24 and in 6 LESKE-LOEWENFELD II 100; STAUB-PINNER in 1 Staub § 105 n. 9a.



## CHAPTER 22

# Recognition

### I. THEORIES OF RECOGNITION<sup>1</sup>

IN the nineteenth century two rival schools of thought dominated the treatment of foreign corporations in private law. Young, in his admirable study of 1912, called them the *restrictive* and the *liberal* theories. Perhaps they may be better described as the theories of the territorial and the extraterritorial or international effect of incorporation. Scarcely noticed in the literature, before the present war a third current gained influence, having nationalism as its distinctive impulse.

#### 1. The Territorial Theory

At one time, the idea generally prevailed that every state had to decide arbitrarily what foreign corporations should have legal personality within its own territory. This doctrine limited the functions of legal persons by geographical boundaries.

In the famous words of Judge Taney:

"A company can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in the contemplation of the law, and by force of the law, and where that law ceases to operate and is no longer obligatory the company can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."<sup>2</sup>

And Field, J., declared:

"The Company being the mere creature of local law, can

<sup>1</sup> For a survey in this country, see MACHEN, "Corporate Personality," 24 Harv. L. Rev. (1911) 253, 347.

<sup>2</sup> Bank of Augusta v. Earle (1839) 13 Pet. S. C. 519 at 588.

have no existence beyond the limits of the sovereignty which created it.”<sup>3</sup>

This doctrine has taken root in American thought, Professor James reminds me, as a result of the colonial English companies. Nevertheless the doctrine sounds strange, when constantly repeated<sup>4</sup> in the courts of the United States, the country of the Bill of Rights, for it comes directly from governmental absolutism and has been engendered by three factors:

First, the tradition of police states required that legal personality be conferred upon an association only by grant of the sovereign. The prince, the state, created the legal entity. This system of *concession, authorization, charter* (in the original meaning), goes back to Julius Caesar and Augustus who made the essential functions of corporations (*coire, convocari, cogi*) dependent on permission by the Emperor or the Senate.<sup>5</sup> The purpose was political precaution against subversive factions, and the system has remained a weapon of suspicious and jealous rulers.

Second, discrimination against *foreign* corporations was nourished by the fear not only of political disturbance but also of foreign economic forces menacing domestic organizations by competition. Laurent, the principal European protagonist of this doctrine, was hostile to certain types of associations.

Third, Savigny and his followers constructed on this background the doctrine of the artificial nature of corporations: Any personality not produced by nature had to be conferred by the lawmaking power and hence was imaginary, fictitious, a mere creature of the law.

<sup>3</sup> Paul v. Virginia (1868) 8 Wall. 168.

<sup>4</sup> Even BALLANTINE, Corporations 843 makes no exception.

<sup>5</sup> MITTEIS, Römisches Privatrecht (1908) 399; RABEL, “Grundzüge des römischen Privatrechts” in HOLTZENDORFF-KOHLER, 1 Enzyklopädie der Rechtswissenschaft 428; SCHNORR VON CAROLSFELD, Geschichte der juristischen Personen (1933).

In a final conclusion from this apparently solid complex of ideas, a corporation was thought necessarily to be restricted to the boundaries of the state and inexistent outside of it.

Such territorialism was defended in Europe by Mancini, Laurent and his contemporaries, and in a late isolated stand, 1908, by André Weiss.<sup>6</sup> In this country, Taney's and Field's dicta were made the basis of the Restatement in 1934,<sup>7</sup> although each part of the doctrine has been thoroughly refuted<sup>8</sup> and entirely discarded by common opinion throughout the world. To maintain the doomed theory in the face of modern conditions, diverse auxiliary theories were invented, such as the "theory of comity" whereby the state permits foreign corporations to function in its territory, although not bound to do so, and the agents' theory which pretends that a foreign corporation despite inexistence in the state nevertheless acts and contracts through agents, that the legal person dwells outside but its agents reside inside. These makeshift constructions also were long since destroyed by the criticism of scholars.<sup>9</sup> The real American law has nothing to do with them.<sup>10</sup>

<sup>6</sup> LAURENT, 4 *Principes* 232, 285 § 119; 4 LAURENT 256, 293 §§ 130, 154; ROLIN, 1 *Principes* § 27, 2 *id.* § 806. For decisions in various countries, see KOSTERS 671 n. 1.

<sup>7</sup> 2 BEALE § 166.1: "The association can exist as a corporation only where that law prevails which makes it such, that is, within the territorial limits of the state of its charter; for the law of a country has no extra-territorial operation." DUDLEY FIELD § 545.

<sup>8</sup> YOUNG 41 and in 23 *Law Q. Rev.* (1907) 151, 290; HENDERSON 163. Fortunately, these truths have been remembered more recently: Note in 79 *U. of Pa. L. Rev.* (1931) 1119, 1135-1138; LATTY, "International Standing in Court of Foreign Corporations," 29 *Mich. L. Rev.* (1930) 28.

European leaders: 1 BAR § 104; LAINÉ, *Clunet* 1893, 273; PILLET, *Personnes Morales* 17-57; *id.*, *Principes* §§ 73, 74; *id.*, 1 *Traité* 336; MICHOD, 2 *Personnalité Morale* §§ 232ff.; 2 LYON-CAEN et RENAULT § 1093; 1 FIORE § 319; FEDOZZI, *Gli enti collettivi nel diritto internazionale privato* (1897) 197-216 and *Il diritto processuale civile internazionale* (1905) 185-212; LO MONACO, *Filangieri* 1885, I, 379.

For more literature see KOSTERS 672; GUTZWILLER 1627; CHARLES DE VISSCHER, *Revue* 1913 at 193.

<sup>9</sup> YOUNG 48; HENDERSON 36-49; see 1 BAR 302; PILLET in *Mélanges*,

Nevertheless, these ghosts from metaphysical spheres reappear in the Restatement and survive in the language of the courts. More dangerous, a few derivatives are popular such as the following: "A corporation cannot perform outside of the state by which it was created, acts which are strictly corporate acts."<sup>11</sup> In particular, meetings of stockholders in matters of formal organization can be held only in the state of incorporation.<sup>12</sup> Authority to an agent must be given in this same state.<sup>13</sup> A state has the right to "exclude" foreign corporations from doing business, or to impose conditions on them for doing business, at its pleasure.<sup>14</sup> Foreign corporations cannot have more rights than domestic corporations.<sup>15</sup>

What life or value there is left in these sayings, we shall have to discover.

## 2. The International Theory

The system developed in the epoch of liberalism brings corporations into a position analogous to that of individuals. Created by the competent state, they need no particular recognition at all in other states. This theory has the background of an even older history than that of the territorial theory. Research in medieval law has discovered that before the time of the princes who claimed sovereignty like Roman Caesars, corporations were freely formed by the association of members. Also the *collegia* and *sodalitates* of the Roman Republic were autonomous creations. Moreover, Germanic as well as Roman legal history has taught that the conception of a corporation as a merely artificial being is utterly wrong.

Antoine Pillet (1929) 500; RIGAUD, 10 Répert. 226 No. 11.

<sup>10</sup> See Note, 79 U. of Pa. L. Rev. (1931) 1119, 1138.

<sup>11</sup> Reichwald v. Com. Hotel Co. (1883) 106 Ill. 439.

<sup>12</sup> Restatement § 163; BEALE, 5 Col. L. Rev. (1905) 255. Outmoded, see STEVENS, Corporations 482.

<sup>13</sup> 2 BEALE 768 par. 2.

<sup>14</sup> Restatement §§ 167, 168. On the reality of things, see HOLT, 89 U. of Pa. L. Rev. (1941) 453.

<sup>15</sup> See *infra* pp. 149ff.

For a time, the scholars of old Germanic law<sup>16</sup> even popularized the idea that in complete antagonism to the allegedly "Roman" fictitious legal person, the medieval associations were living bodies, vigorously working in all public spheres and of more economic, social, and political significance than their individual members. This Germanistic approach left lasting improvements in domestic laws, as for instance in giving the principal representatives of corporations the role of "organs" that embody the will of the corporate "body" and are able to obligate the entity by contract and in tort.<sup>17</sup> But this theory also has been abandoned by better advised scholars. From the historical point of view, the concept of the "universitas," designed by the Roman jurists after the pattern of the autonomous city (*polis*), has formed the eternal model of an entity distinct from its members in its relations to the outside world. The internal relation between a private corporation and its members with respect to their participation in the common assets and debts varied even in the ancient world. Thus, the antithesis of a "Roman" soulless fictitious person and a Germanic living organism was highly distorted. From the theoretical angle, present writers like to say that individuals also take their legal status from the law, hence there is no innate ground why organizations should be discriminated against. In addition, the normal method of bestowing personality upon associations is no longer granted by special act but statutory determination of conditions precedent—in Europe called "normative conditions"—by complying with which private persons may create legal bodies.

While trade and industry have multiplied their associations and gained for them wide international admission, the mightiest impulse, of course, has come from the immense

<sup>16</sup> In the first place, OTTO GIERKE, *Die Genossenschaftstheorie und die Deutsche Rechtsprechung* (1887) 5, 604.

<sup>17</sup> See German BGB. § 31; Swiss C.C. art. 55: the will of a juristic person is expressed through its organs (not "organisms" as SCHICK translates).

growth of capitalism. Industrialization favored and needed concentration of means. Exchange of raw materials, industrial products, and skilled enterprise opened countries to corporate ventures. In the height of the capitalistic era, few nations wanted to hide behind Judge Taney's doctrine, certainly not the United States.

It is of extraordinary interest that the liberal system was declared in England as early as 1724 by leading cases which still have authority.<sup>18</sup> Foreign companies have ever since been accorded recognition as respects their personality, as well as full freedom to do business in Great Britain. The Canadian courts are well aware, despite their many contrary statutes, that "at common law, a foreign corporation may carry on business in a jurisdiction other than its own without having special authority to do so."<sup>19</sup>

Elsewhere, this system was adopted in the course of the nineteenth century. The commission of German states, which drafted the General Commercial Code of 1862, found it so obvious that the civil existence of foreign companies must be recognized that no provision to this effect was considered necessary.<sup>20</sup> But the right to do business was distinguished. Unconditional recognition, at least in this meaning, has remained the nearly unchallenged principle for commercial associations in most of Europe, and has been defended with respect to all juristic persons by most of the literature.<sup>21</sup> Only the French Republic has insisted in principle, despite the French writers, on certain restrictions established under Napoleon III, against foreign stock corporations.

<sup>18</sup> *Dutch West India Co. v. Henriques Van Moses* (1724) 1 Strange 612; *Henriques v. General Privileged Dutch Co.* (1728) 2 Ld. Raym. 1532, 92 Eng. Re. 494.

<sup>19</sup> *C. P. R. v. Western Union Telegraph Co.* (1890) 17 S. C. R. 151; *Ontario Wind Engine & Pump Co. v. Eldred* (Sask. 1912) 2 W. W. R. 60, 2 D. L. R. 270.

<sup>20</sup> Protokolle 371, 42. Sitzung (quoted by WALKER 202).

<sup>21</sup> See also ARGANA, Report in República Argentina, Segundo Congreso Sudamericano 223.

### 3. Reactionary Trends

Developments between the two world wars have demonstrated once more that the problem of recognition of foreign corporations is more intimately connected with economic and political considerations than with abstract speculation. From the beginning, the Soviet Union has been slow to recognize foreign legal persons. The National Socialist Law on Stock Corporations of 1937 abolished free admittance of foreign business associations to the carrying on of business,<sup>22</sup> and the comment by a national socialist author revives Laurent's theory.<sup>23</sup> French and Latin-American laws and literature have shown much of the same spirit, perhaps not so much aiming at restoring the territorial nature of incorporation, as endeavoring to strengthen the examination, supervision, and governmental domination of foreign enterprises. Regulations to enforce control over the activities of immigrant business go hand in hand with measures to close certain branches to all foreigners and to enforce the practice of certain quotas of nationals on boards of directors and membership lists.

Nevertheless, except for Russia, the principle of unconditional recognition has not lost its prevailing role. Notwithstanding conscious and unconscious exceptions, it may be asserted that this principle prevails at this moment throughout the world. Language in both Americas sounding as if recognition depended on authorization, often is not to be taken literally. Even so, the picture is complicated, and the practical effect of recognition is reduced or menaced by restrictions of many kinds.

It is convenient, therefore, to define first the concept of recognition according to actual laws.

<sup>22</sup> See *infra* p. 183.

<sup>23</sup> BEITZKE, Jur. Personen 7, 49, criticized by RAAPE, 5 Z. AK. Deutsches R. (1938) 715.

#### 4. Concept of Recognition

If the liberal theory were carried through without exception, there would be no need for a notion other than that of the personal law, since under this theory any foreign corporation created by the personal law exists within the forum. The need arises only because in certain countries or for certain types of legal persons the personal law acquired abroad is not held sufficient to support the existence of a corporation *within* the forum. There is no evidence that any jurisdiction would disregard the existence of a juristic person in the state where it has been validly constituted according to the law regarded as competent at the forum.

Recognition, consequently, signifies that the authorities of a state affirm a foreign-created legal person as existent for all purposes, applying the law considered to be the personal law.

Recognition does not mean the creation of a new person, as would be the logical implication of the theory whereby a corporation "can exist only in the country which makes it such" and "the consent of another state cannot alter the matter."<sup>24</sup> Under the influence of such imaginations, (1) recognition of an existing legal entity, (2) reincorporation, i.e., the constitution of a new personality, and finally, (3) "domestication," which lies in between, were easily confused.<sup>25</sup> By an effect felt up to our days, we still hear the contention that recognition is dependent on a sort of naturalization. But a sharp distinction is important. A compulsory requirement of the latter character has correctly been called an unjustifiable trespass on the foreign competent law.<sup>26</sup>

<sup>24</sup> 2 BEALE § 166.1.

<sup>25</sup> 1 FIORE § 320. On the distinction of "domestication" from the mere pursuit of business, see 2 BEALE § 153.7. The German Reichsgericht (July 11, 1934) JW. 1934, 2845, Clunet 1935, 164, IPRspr. 1934 No. 12 observed this distinction with respect to an English certificate of registration.

<sup>26</sup> CHARLES DE VISSCHER, *Revue* 1913 at 194, 195 and n. 1.



Of course, there is no rule of present international law obligating a state to recognize foreign-created juristic persons.<sup>27</sup> There exists, however, theoretical agreement on the desirability of mutual liberality, expressed in numerous drafts to multipartite treaties.<sup>28</sup>

On the other hand, recognition does not necessarily include, and in the great majority of countries does not include, permission to have a place of business or an agent, or to do business in the country. Moreover, various restrictions are imposed. This, of course, deprives recognition of much of its practical value. Yet recognition involves legal personality only, not permission to engage in commercial or other activities.<sup>29</sup> These two categories, although correctly contrasted, have been inadequately termed by some Anglo-American writers "civil capacity" and "functional capacity."<sup>30</sup> With more clarity, commentators on the recently repealed Italian Commercial Code state that the poorly drafted sections therein, regulating the business of foreign mercantile organizations, do not really "create the prerequisites of their legal constitution" but instead "presuppose their legal constitution under the foreign law."<sup>31</sup>

What prerogatives usually flow from recognition as such will have to be discussed more closely after a survey of the systems adopted in the present legislations.

## II. CONDITIONS FOR RECOGNITION

### I. Unconditional Recognition

Under the system attaching international effect to the

<sup>27</sup> 1 BAR 302; NIEMEYER, "Les sociétés de commerce," *Recueil* 1924 III 40 n. 1.

<sup>28</sup> See art. 6 of the Draft on the Treatment of Foreigners, 1929, *Revue* 1930, 238; VERDROSS, 37 *Recueil* (1931) III 405.

<sup>29</sup> PILLET, *Personnes Morales* § 13.

<sup>30</sup> YOUNG, 23 *Law Q. Rev.* (1907) 162; LATTY, 29 *Mich. L. Rev.* (1931) 34; SCHUSTER, 7 *Tul. L. Rev.* (1933) 345, 362 n. 86; 8 *id.* 570.

<sup>31</sup> Note, *Rivista* 1912, 509.

creation of a corporation, recognition in the practically restricted meaning, just defined, is obtained *ipso jure*, without the need of any step, such as filing for registration, paying of fees, or applying for a decree.

(a) *For all organizations.* This system, applied to all corporations and other associations, is actually in force in England,<sup>32</sup> and the United States,<sup>33</sup> as well as Brazil,<sup>34</sup> Greece,<sup>35</sup> the Netherlands,<sup>36</sup> Spain,<sup>37</sup> Switzerland,<sup>38</sup> and certain other countries.<sup>39</sup> It has also been adopted in the Montevideo Treaties<sup>40</sup> and in the *Código Bustamante*.<sup>41</sup>

The statutory Argentine rule is in controversy but the best authorities indicate a system exactly parallel to that of the United States, requiring authorization only for the carrying on of business.<sup>42</sup> In Italy, the principle was for a long time

<sup>32</sup> See *supra* n. 18. A condition is that the government of the country of creation is recognized by the British Government, see 5 HALSBURY'S Laws of England (1932) 860.

<sup>33</sup> Restatement §§ 152ff. speaks of all incorporated associations, but as to unincorporated bodies see *supra* pp. 108 n. 59, 112 n. 80.

<sup>34</sup> Brazil: This theory has been prevailing in the opinion of the leading writers, see CARVALHO DE MENDONÇA, 4 *Trat. Dir. Com.* § 1510, ESPINOLA, 6 *Tratado* 557, and clearly adopted in *Introd. Law* (1942) art. 11, *cf.* ESPINOLA, 8-C *Tratado* 1775.

<sup>35</sup> Greece: App. Athens (1937) No. 2091, 49 *Themis* 406, *Clunet* 1938, 900; 2 *STREIT-VALLINDAS* § 23; C. C. (1940) art. 10 (the draft had required royal authorization).

<sup>36</sup> The Netherlands: H. R. (March 23, 1866) W. 2781; KOSTERS 672.

<sup>37</sup> Spain: *Arg. C. C.* art. 28, *cf.* 27; C. Com. art. 15, *cf.* 21 last par.; see TRÍAS DE BES 376 § 324. This includes associations, excepting certain classes such as religious orders, since the Law of Associations of June 30, 1887 does not distinguish domestic from foreign associations.

<sup>38</sup> Switzerland: BG. (July 12, 1934) 60 *BGE*. I 225; SCHNITZER, *Handelsr.* 81.

<sup>39</sup> Austria: The Imperial Decree of Nov. 29, 1865 concerning "the admission of foreign stock corporations and stock companies with limited partners to carrying on business in Austria" has been explained in the prevailing opinion as not referring to recognition, see WALKER 202. This construction was maintained in Czechoslovakia, see LAUFKE, 7 *Répert.* 186 Nos. 58, 59.

For the group of codes following the Spanish model, see Chapter 23 n. 31.

<sup>40</sup> *Supra* p. 35.

<sup>41</sup> *Código Bustamante*, art. 33.

<sup>42</sup> Argentina: C. Com. arts. 285-287; ZEBALLOS, *Clunet* 1906, 604-618; MACHADO, 1 *Cód. Civ. Arg.* 74; 1 WEISS-ZEBALLOS 414; RIVAROLA, 145 *Revista Gen. Legisl. y Jur.* (Madrid 1924) 533, 539. More recently, opinions

affirmed by the writers and rejected by the courts.<sup>43</sup> Finally, the Supreme Court adhered to it in 1930 and 1931,<sup>44</sup> and so apparently does the new Civil Code.<sup>45</sup>

In Belgium, unconditional recognition has been granted by statute to foreign "commercial companies" only, but is extended to all legal persons, public and private, by liberal writers and by some courts,<sup>46</sup> although other authorities continue to deny capacity, particularly to foreign nonprofit associations when they bring actions.<sup>47</sup>

on the interpretation of C. C. arts. 33, 34, as against art. 45 were sharply divided between ALCORTA, 2 *Der. Int. Priv.* 34 and 3 VICO § 83. The old liberal doctrine defended by Vico seems to remain victorious. See App. Buenos Aires (April 20, 1934) 46 *Jur. Arg.* 183, 187; ROMERO DEL PRADO, *Der. Int. Priv.* 83; Note, *Clunet* 1938, 838. Art. 45 of C. C., thus, is understood to apply to authorization for business only. Law No. 8867, of February 6, 1912 is understood to mean that this authorization is not needed in case of reciprocity. However, the practice is called "*peu libérale*" in *Clunet*, *loc. cit.*

Paraguay: The liberal theory is adopted by BAEZ 47.

<sup>43</sup> FEDOZZI 71; CAVAGLIERI, *Dir. Int. Com.* 241; UDINA, *Elementi* § 79, referring to C. C. (1865) arts. 2 and 3; C. Com. (1882) art. 230.

<sup>44</sup> Cass. (March 11, 1930) *Rivista Dir. Priv.* 1931, II, 161. Note, SERENI in 8 *Annuario Dir. Comp.* III 11; summary, 1 *Annual Digest* (1931-1932) 278 No. 146. Cass. (July 27, 1931) *Giur. Ital.* 1932 I, 1, 162, *Rivista* 1931, 183.

<sup>45</sup> *Disp. Prel.* (1938) art. 6; *id.* (1942) art. 16 par. 2, states that the rule of par. 1, on principle granting foreign individuals the civil rights of nationals, applies also to foreign legal persons. The final draft (art. 9) expressed the principle that they enjoy the same capacity as national juristic persons but not more than in the foreign country. The Minister of Justice held it more prudent to say expressly that juristic persons are treated like foreign individuals in order not to revive a former controversy. (*Relazione SOLMI*, 1938, § 7). Evidently, in this line of thought, the law of aliens and recognition of the personal law are identified. Soberly considered, however, the actual text limits itself to a somewhat problematic provision regarding merely the law of aliens. Hence, it is understandable that AZZARITI-MARTINEZ, 1 *Diritto civile italiano secondo il nuovo codice* (1940) 371, raises the question whether foreign legal persons may be considered existing and may exercise their civil rights in Italy without being "recognized" by the Italian State. In his own opinion, recognition is granted without a formal act.

<sup>46</sup> Consolidated Companies Act 1935, art. 196, corresponding to art. 128 of the original text of 1873 and art. 171 of 1913. See POULLET §§ 200-203; Cass. (April 12, 1888) *Pasicrisie* 1888.I.186.

<sup>47</sup> Belgium: *Cour Bruxelles* (May 4, 1932) *Clunet* 1933, 184 (a French association of cheese manufacturers); Cass. (Nov. 12, 1935) 3 *Giur. Comp.* DIP. No. 131 (action by the French association of authors and composers, with strange arguments, see *supra*, Chapter 21, n. 51).

(b) *For trading associations.* In a second system, the principle applies only to trading corporations and other commercial organizations, having a stable central place abroad. Also some followers of the territorial theory, making an exception, consent to this result for the sake of advanced international commerce.<sup>48</sup> Nonprofit associations encounter more distrust.

Thus, in Germany foreign business corporations and partnerships have been recognized *ipso jure* from an early time<sup>49</sup> in what may be qualified as customary law. The same rule obtains, e.g., in the Netherlands,<sup>50</sup> Rumania,<sup>51</sup> Yugoslavia,<sup>52</sup> Japan,<sup>53</sup> and in the influential Civil Code of Chile<sup>54</sup> whose example has been followed in numerous special Latin-American laws on stock corporations.<sup>55</sup>

In France, an analogous customary rule has been strongly curtailed by an exceptional legislation concerning capital stock corporations, so as to limit unconditional recognition to business organizations on a personal basis: copartnership and partnership *en commandite*.<sup>56</sup>

Whether the Soviet Russian law recognizes in any way

<sup>48</sup> ROLIN, 1 Principes 167 § 28, conveniently recalled by LATTY, 29 Mich. L. Rev. (1931) 33.

<sup>49</sup> ROHG. (April 28, 1871) 22 ROHGE. 147; and the constant decisions of the Reichsgericht from 7 RGZ. 70. See 83 RGZ. 367.

<sup>50</sup> The Netherlands: Rb. Rotterdam (June 5, 1913) W. 9549.

<sup>51</sup> Rumania: C. Com. (1887) art. 237.

<sup>52</sup> Yugoslavia: C. Com. (1937) § 502 par. 1.

<sup>53</sup> Japan: C. Com. art. 255. Although the Japanese Civil Code, art. 36 (1) speaks exclusively of commercial companies, art. 255 of the Commercial Code has been interpreted by the Supreme Court (April 17, 1905) 1 C. Com. of Japan Ann. 406 case 165, as not distinguishing whether a foreign company is a juristic person or not.

<sup>54</sup> See 3 VICO 40.

<sup>55</sup> See especially Honduras: C. C. art. 57, cf. BIJON, 6 Répert. 443 No. 35; C. Com. (1940) art. 10.

Mexico: C. C. (1928) art. 2736, see SCHUSTER, 7 Tul. L. Rev. (1933) 348; Ley General de Sociedades Mercantiles (1934) art. 250.

Venezuela: C. Com. (1919) arts. 359 (new 334) ff.; see GOLDSTONE, 17 Tul. L. Rev. (1943) 587; and now C. C. (1942) arts. 19, 30, 1651.

<sup>56</sup> See 2 WEISS, Traité 484; 2 LYON-CAEN et RENAULT 914 § 1093.

foreign business organizations, as has been asserted, cannot be ascertained.<sup>57</sup>

(c) *For nonprofit corporations.* Prevailing though somewhat uncertain French doctrine<sup>58</sup> traditionally has regarded foreign associations with purposes other than profit as *ipso jure* existent, irrespective of reciprocity. Nor were exceptions of public policy raised even when a foreign domiciled religious congregation, whose French department had been dissolved in 1901, brought actions in France.<sup>59</sup> However, among others, the question remained unsettled whether foreign associations could do more than the modest acts permitted to French associations not enjoying a declaration of "public utility." At present, these doubts are ended; a decree prior to the war of 1939, which may be of temporary character, required governmental authorization as a condition of recognition.<sup>60</sup>

A German statutory provision, too, declares that associations pursuing noneconomic purposes need a decree of recognition,<sup>61</sup> but the Reichsgericht has recently confirmed the doctrine that such a decree is unnecessary except to validate a contract concluded in Germany and also governed by German private law.<sup>62</sup> Apart from this case, such an association

<sup>57</sup> MAKAROV, Précis 229 apparently thinks that the special authorization required by the laws of the USSR regards only the doing of business, but that unrecognized foreign corporations may sue in Russia, upon claims arising abroad, only under reciprocity.

<sup>58</sup> See the opinions (very divergent on many points) of PILLET, *Personnes Morales* § 269; HÉMARD, *Théorie des nullités* §§ 335-351; LEREBOURS-PIGEONNIÈRE § 169; NIBOYET § 319 and *contra*, 2 *Traité* 345 § 816.

<sup>59</sup> Aix (Feb. 27, 1913) *aff'd*, Cass. (req.) (Nov. 24, 1914) D. 1916.1.193; NEUMEYER, 1 *Int. Verwaltungs R.* 136 and authors cited; 2 *ARMINJON* § 199. Similarly, e.g., Italy: App. Milano (Jan. 17, 1928) *Clunet* 1928, 1287.

<sup>60</sup> France: Decree of April 12, 1939, see *supra* Chapter 19 n. 109.

<sup>61</sup> EG. BGB. art. 10; a decree as envisaged in this section has very seldom been requested. Only one case is known where an authorization was granted, that of the German-Austrian Alpinist Association when it moved headquarters temporarily to Innsbruck, Austria.

<sup>62</sup> RG. (Oct. 29, 1938) 159 RGZ. 33 at 47, implicitly indorsing the opinion of WIELAND, 43 *Z. Schweiz. R. (N. F.)* 225; Th. KIPP in BGB. Handausgabe FISCHER-HENLE-TITZE (1932) note to EG. BGB. art. 10; RAAPE 161; M. WOLFF, IPR. 71 n. 13.

is treated like a German association without legal personality, its agents acting in the country are personally liable,<sup>63</sup> and the entity may also be sued.<sup>64</sup>

There are, on the other hand, laws recognizing foreign corporations of public interest more readily than commercial companies.<sup>65</sup>

(d) *Foundations*. With respect to foundations, whether public or private, the contrast of theories has been solved by a definite victory of the "liberal" doctrine. Even in France, the rule has been adopted that no authorization is needed for recognition of the legal existence and capacity of a private foundation in accordance with the law of its foreign "seat."<sup>66</sup> Of course, activities in pursuance of the constitutional documents are subject to particularly anxious control under the territorial law.<sup>67</sup>

(3) *Partnerships*. While partnerships are recognized unconditionally in many countries along with corporate business associations, they are also treated in the same manner in countries where barriers against stock corporations or against nonprofit associations have been established,<sup>68</sup> with the possible exception of a few Latin-American countries.<sup>69</sup> Partnerships have never been subject to authorization, nor has

<sup>63</sup> BGB. § 54 par. 2; EG. BGB. art. 10 sent. 2.

<sup>64</sup> In analogy to ZPO. § 50 sent. 2, § 735.

<sup>65</sup> See for instance Chile: Corte Suprema (August 10, 1936) 33 Rev. Der. Jur. y Ciencias Soc. II, 1, 449, 452, 470 recognizing the Junta Provincial de Beneficencia de Sevilla, Spain, according to Spanish law, as testamentary heir of Chilean immovables; the court emphasizes that the Chilean legislature has not established the requirements as for lucrative corporations.

<sup>66</sup> NEUMEYER, 1 Int. Verwaltungs R. § 13; PILLET, Personnes Morales § 306; CHARLES DE VISSCHER, Revue 1913, at 191; CRÉMIEU, 8 Répert. 437 No. 52; LEREBOURS-PIGEONNIÈRE § 169.

<sup>67</sup> CHARLES DE VISSCHER, *id.* at 206.

<sup>68</sup> Hence even in France a Colombian partnership could obtain without formalities a judgment and, therefore, in Belgium an exequatur, Trib. Antwerp (June 27, 1936) Jur. Port Anvers 1937, 56.

<sup>69</sup> For Brazil see *infra* Chapter 23, p. 184 n. 54.

Mexico: C. C. art. 2736 speaks of authorization necessary for "the foreign associations and companies of civil character."

territoriality been claimed to affect their creation. The doctrine regarding partnerships has been helped by the usual exaggerated emphasis on their personal basis, but substantially it must have been important that economic dangers from partnerships were not so feared as from big corporations.

Only one question has disturbed the simplicity of this matter. As the distinction between mercantile and nontrading or civil associations may be decisive, which law determines the mercantile character? Is it the law of the forum,<sup>70</sup> the personal law (of the "seat" or creation),<sup>71</sup> or either of them?<sup>72</sup> The Belgian solution accepting the last answer,<sup>73</sup> is the best; if an association serves commercial, industrial or financial purposes, as defined at the forum, it should be recognized even though it may be considered nontrading at home.

## 2. Special Conditions for Recognition

(a) *Authorization in case of reciprocity—France.*<sup>74</sup> When in the 1850's under the spell of Laurent's territorial theory Belgian courts suddenly declared French stock companies (*sociétés anonymes*), which played a large part in Belgian economics, to be "inexistent" in Belgium and denied them the right to sue, the French government protested. Finally, the two countries reciprocally recognized each other's governmental charters creating stock corporations. The French Law of May 30, 1857, sanctioning this agreement, permitted the French government to extend by decree the rights conferred

<sup>70</sup> *Lex fori*: 1 LYON-CAEN et RENAULT § 211 and 2 *id.* § 1127; ARMINJON, *Revue Dr. Int.* (Bruxelles) (1927) 368; NUSSBAUM, *D. IPR.* 190.

<sup>71</sup> Personal law: ASSER-RIVIER, *Eléments* 190; STREIT, *Z.int.R.* (1896) 321; PILLET, *Personnes Morales* §§ 182, 192, 230; CAVAGLIERI, *Dir. Int. Com.* 172.

Undecided: Institute of Int. Law, *Draft* 1929, art. 6, *Annuaire* 1929 II 302.

<sup>72</sup> See DIENA, 1 *Dir. Com. Int.* 293, 296.

<sup>73</sup> POULLET § 213, and cases cited. To the same effect, Yugoslavia, *C. Com.* (1937) § 500 par. 2.

<sup>74</sup> 2 LYON-CAEN et RENAULT §§ 909ff.

upon the Belgian companies to those of other countries. In 1867, France, following the model of England, replaced the method of special decrees creating individual corporations by that of general statutes under which private persons may create corporations, and Belgium (1873), as well as most other countries, followed suit. Nevertheless, France maintained the system of stating by decree that a certain foreign country observes reciprocity with France, and that therefore stock corporations created in that country are to be recognized. These decrees have reached a great number.<sup>75</sup> In addition, many bipartite treaties grant mutual recognition of corporations and are regarded as equivalent to decrees stating reciprocity. Such treaties have been concluded among others, with Great Britain, on April 30, 1862, and Canada, on December 15, 1922, while a decree was rendered with respect to the United States on August 6, 1882. The list of nations so involved is long but not exhaustive.<sup>76</sup>

The French system has been imitated in some other countries, in Greece in particular.<sup>77</sup> In Belgium<sup>78</sup> and Italy,<sup>79</sup> it was soon abandoned. A devastating criticism was expressed by the greatest French writer on commercial law, Charles Lyon-Caen,<sup>80</sup> but has not been of any avail.

The position of an unauthorized foreign stock corporation in France has been developed without consistency. A corporation has no capacity to contract and may not sue third parties but, if sued, is not allowed to defend on the

<sup>75</sup> On controversies concerning the right of the most favored nation, see 2 LYON-CAEN et RENAULT § 1102.

<sup>76</sup> See the list given by NIBOYET 371 n. 3.

<sup>77</sup> See CARABIBER, 6 Répert. 414 Nos. 42-44; MARIDAKIS, 11 Z.ausl.PR. (1937) 119. But the present Code is liberal, see *supra* n. 35.

<sup>78</sup> Belgium: Consolidated Companies Act, of May 18, 1873, art. 128.

<sup>79</sup> Italy: C. Com. (1882) art. 230.

<sup>80</sup> Reports of 1888 and 1891 to the Institute of Int. Law, 11 Annuaire (1889-1891) at 160. Also NIBOYET, in this case, advocates the liberal principle of recognizing foreign legal persons not doing business in the country, see 2 Traité (1938) 282 § 770, 341 § 813.



ground of its own irregularity,<sup>81</sup> because domestic creditors should be protected. The incoherence of this system is increased by the consideration that the entity may function as a *de facto* corporation under domestic law and in such quality can engage in contracts and maintain branches, as well as be subject to bankruptcy proceedings.<sup>82</sup>

*Other countries.* Reciprocity has been required as the only condition of recognition in Hungary<sup>83</sup> and Czechoslovakia.<sup>84</sup> In Latin-American states, reciprocity has been a popular requisite,<sup>85</sup> but increasingly it has been found incompatible with the principle that foreigners and foreign juristic persons are assimilated to nationals. For this reason, Colombia cancelled the requisite of reciprocity in its Constitution of 1936.<sup>86</sup>

(b) *Special authorization.* It follows from the restricted domain of unconditional recognition already mentioned that all foreign nonprofit corporations need special authorization for being able to avail themselves of their existence in Belgium, France, Germany (with modifications), the Netherlands, Rumania, Soviet Russia, Yugoslavia, Chile and most other Latin-American countries, and Japan.

Also, private and public foundations need authorization in some countries, and business corporations which are not of a certain type may possibly need it in some jurisdictions.

In a few Latin-American countries, finally, it is claimed that the personality of a foreign corporation is recognized only when it is authorized by the government, and some authors take this pretension seriously.<sup>87</sup> In these jurisdictions

<sup>81</sup> HÉMAR, *Théorie des nullités* §§ 342-345; 2 LYON-CAEN et RENAULT § 1104; THALLER, *Traité* § 771.

<sup>82</sup> PILLET, 1 *Traité* § 740.

<sup>83</sup> DE MAGYARI, *Clunet* 1924, 595; anonymous, 6 *Répert.* 456 Nos. 18 bis, 19.

<sup>84</sup> On the basis of § 33 of the Allg. BGB., see LAUFKE, 7 *Répert.* 187 No. 62.

<sup>85</sup> Reciprocity is still required in other respects in Argentina, see *infra* p. 179.

<sup>86</sup> See TULIO ENRIQUE TASCÓN, *Derecho Constitucional Colombiano* (ed. 2, 1939) 60; cf. with respect to individuals, CAICEDO 123 § 81.

<sup>87</sup> See Chapter 23 ns. 48ff.; and see as an example of certain laws, Honduras, Law of Foreigners of 1926, art. 4: foreign juristic persons enjoy the rights

nonauthorized companies seem not to be allowed the minimum of rights which recognition usually confers.<sup>88</sup> Moreover, there are countries where either authorization of the existence, or the registration at an office, is said to be essential for the recognition of any legal person. We shall encounter such theories, mostly of a doubtful nature, with respect to several Latin-American jurisdictions. Also, the Chinese authorities, using their peculiar technique, have declared that "it is not known" how a foreign juristic person having no business place in China could be registered, and therefore that it is "difficult to recognize its personality."<sup>89</sup>

### 3. Treaties

The problem was much discussed for a time whether the clause usual in bilateral treaties that the "subjects" of either contracting power should enjoy treatment of the most favored nation in matters of commerce, applied to the recognition of the personality of corporations.<sup>90</sup> Therefore, treaties of amity or commerce have included provisions expressly assuring the reciprocal recognition of corporations and, sometimes, also of associations. But the significance of these clauses is now limited to countries denying recognition in the absence of a treaty, factual reciprocity, or special authorization.<sup>91</sup>

Among the other provisions, the clauses allowing isolated acts of business or minor activities, and access to courts, concern our present subject but scarcely alter the existing situation.

granted them by the laws of the country of their domicile provided that they have been recognized by the Executive Power.

<sup>88</sup> See *infra* ns. 101, 122.

<sup>89</sup> 2 Interpretations du Yuan Judiciaire en matière civile (Le Droit Chinois Moderne, No. 35, 1940) 16 § 387, Interpr. No. 1471 of April 3, 1925.

<sup>90</sup> See for the affirmative view, WEISS, 2 *Traité* 505 (with many references). *Contra*: 2 LYON-CAEN et RENAULT 924 § 1102; PILLET, *Personnes Morales* 183, 184 § 124.

<sup>91</sup> On Código Bustamante, art. 32, see SCHUSTER, 8 Tul. L. Rev. (1934) 571 n. 14.

## III. EFFECTS OF RECOGNITION

## 1. Full Effect

In a few countries outstanding for their broad views and cosmopolitan mentality, such as Great Britain, Switzerland, the Netherlands, and Greece, recognition is traditionally granted to any organization in the world legally created in the state of its central office or, in the British case, in any state. This recognition means in principle no less than the permission to exercise the purposes of the charter. It is fair to state that, although France reserves its general authorization of foreign stock companies, this authorization, if given to the companies of a certain country, includes the right of doing business within the country. The principle is not inconsistent with regulations such as the prescription of registration.

But this standard is not reached in most countries.

## 2. Minimal Effect

In view of the manifold impositions and restrictions to which in the majority of the territorial laws the activities of foreign associations are subject, it is convenient to ask, What position results from the mere fact of authorization, independently of any other requisite?

There are two such rights guaranteed and generally accorded in the international treaties. One is the capacity to be a party to a suit, and the other the capacity to engage in "isolated acts." Not without justification the first category sometimes appears absorbed by the second, but it has to be considered here separately in accordance with the more common usage.

(a) *Capacity to be a party.*<sup>92</sup> Capacity to sue and to be sued as a party to litigation in court has been regarded as a "natural

<sup>92</sup> Cf. LATTY, "International Standing in Court of Foreign Corporations," 29 Mich. L. Rev. (1930) 28.

right" of a corporation,<sup>93</sup> or as a means of realizing its rights,<sup>94</sup> and as "indispensable to protect the personal status."<sup>95</sup> The Supreme Court of the United States has held that the power of a foreign corporation to bring proper suit in a state tribunal is guaranteed by the Due Process Clause.<sup>96</sup> We may take it as the by far prevailing view that foreign corporations are considered capable of being a party not only in jurisdictions where they are entitled to carry on business of a permanent character, but also in those where they would need to comply with some impositions if they were to do "business" but in fact do not carry on any such business.<sup>97</sup> The situation is different, when a foreign corporation should have complied with statutory requirements and in violation thereof has done

<sup>93</sup> 2 KENT 284; STORY § 565; LINDLEY, On Companies 1221 g; WALKER 158.

<sup>94</sup> YOUNG 89.

<sup>95</sup> THOMPSON § 7977.

<sup>96</sup> Kentucky Finance Corp. v. Paramount Auto Exchange Corp. (1922) 262 U. S. 544; Note, 79 U. of Pa. L. Rev. (1931) at 1135-1138.

<sup>97</sup> England: WESTLAKE § 306; YOUNG 179.

United States: Society for the Propagation of the Gospel v. Wheeler (1814) 2 Gall. 105; Bank of U. S. v. Deveaux (1809) 5 Cranch 61, 78; HENDERSON 39-42.

Canada: Creamette Co. v. Famous Foods, Ltd. (1933) Ex. C. R. 200 (action for infringement of trade mark).

Argentina: C. C. arts. 35, 44, C. Com. art. 285.

Brazil: Sup. Trib. Fed. (Sept. 2, 1932) 24 Arch. Jud. 394 (action by Delaware corporation to cancel defendant's commercial name). The cases are digested by RODRIGO OCTAVIO, Dicionario Nos. 1259 to 1269 and reviewed by KNIGHT, 7 Tul. L. Rev. (1933) 210. Cf. CARVALHO DE MENDONÇA, 4 Trat. Dir. Com. 277; ESPINOLA, 6 Tratado 567 No. 6 and 8-C *id.* 1775.

Chile: In one opinion, see HERRERA REYES, Sociedades Anónimas (1935) 271 § 299.

Denmark: BORUM and MEYER, 6 Répert. 217 No. 28.

The Netherlands: C. Civ. Proc. arts. 127, 768; Rb. Amsterdam (March 17, 1899) W. 7351, and (May 7, 1900) W. 7400, Clunet 1903, 925.

Portugal: C. Com. art. 109.

Rumania: Cass. (June 8, 1937) No. 1428, Clunet 1938, 961.

Sweden: MALMAR, 7 Répert. 141 No. 149.

Switzerland: BG. (July 12, 1934) 60 BGE. I 220, 226: corporation of New York; recognition exists *ipso jure* and implies the faculty of standing in court.

Turkey: Law of Nov. 30, 1330/1914, art. 12.

Venezuela: Corte Federal y de Casación (Aug. 4, 1934) Lahoud v. Colgate Palmolive Peet Co. (1937) Gaceta Oficial 114.079, cf. CRAWFORD, 12 Tul. L. Rev. (1938) 222.

business in the state, but in many jurisdictions full capacity is granted even in this case.<sup>98</sup>

Capacity for suing and being sued is so much the most important incident of recognition and so frequently causes international preoccupation, that provisions for securing it appear in all bipartite and multipartite treaties or drafts involving business associations.

Exceptions to this principle, however, discernible in numerous instances, deserve examination.

Sometimes an alleged exception is caused by confusion be-

<sup>98</sup> United States: *Cooke, J.*, in *Alpena Portland Cement Co. v. Jenkins and Reynolds Co.* (1910) 244 Ill. 354, 91 N. E. 480; *McKee v. Stewart Land & Live Stock Co.* (1925) 28 Ariz. 511, 238 Pac. 326; *Mandel v. Swan Land & Cattle Co.* (1895) 154 Ill. 177, 40 N. E. 462.

Canada: Alberta: *Companies Act*, s. 149 (1) as construed in *Lampson, Fraser & Huth, Inc. v. Simpson* [1942] 3 W. W. R. 238 (Alta.); British Columbia: *Charles H. Lilly Co. v. Johnston Fisheries Co.* (1909) 10 W. L. R. 2: "The ordinary common law right to sue was not taken away or interfered with by the (Brit. Col. Companies) Act" (s. 143). *Northwest Trading Co. v. Northwest Trading Co.* [C. A. 1920] 1 W. W. R. 353, *aff'd* [1920] 3 W. W. R. 729 (action to compel defendant to change its name); Ontario: *Howe Machine Co. v. Walker* (1877) 35 U. C. Q. B. 37 (C. A.); Quebec: *Ontario Marble Works, Ltd. v. Lepage Marble Works, Ltd.* (1924) 31 Que. Pr. 217; Saskatchewan: *Bondholders Security Corp. v. Manville* [1933] 3 W. W. R. 1, [1933] 4 D. L. R. 699 (Sask. C. A.).

Austria: (Stock companies not having been permitted business): OGH (Oct. 10, 1888) 26 GIU. No. 12389; (June 22, 1932) 14 SZ. 425 No. 132; WALKER 204 n. 11.

Belgium: Cass. Belge (Oct. 6, 1904) *Pasicrisie* 1904.1.362: French mutual insurance company in absence of the publications prescribed by art. 198 of Consolidated Companies Act; App. Bruxelles (Feb. 8, 1924) *Revue Inst. Belge* 1925, 232; see also Trib. Com. Liège (June 28, 1937) 5 *Giur. Comp. DIP.* (1939) 10 § 8. Formerly Cass. (March 7, 1895) *Clunet* 1895, 876 had held the contrary opinion, but was criticized.

Brazil: The question seems not to have been decided, although the decisions referred to in the preceding note (see in particular Sup. Trib. Fed. (May 6, 1925) 83 *Revista Dir.* 326, *ESPINOLA*, 1 *Pandectas Brasileiras*, pt. 2, 280) regularly held that foreign business corporations have personality "independently of governmental authorization."

Chile: In one opinion, see *HERRERA REYES, Sociedades Anónimas* (1935) 271 § 299.

Italy: App. Torino (Jan. 7, 1936) *Rivetta v. Rendley*, *Foro Ital.* 1936 I 397 citing ample precedents.

Rumania: See *NEGULESCO, Clunet* 1910, 55.

tween recognition and permission to do business, as only recently in the Yugoslavian Commercial Code.<sup>99</sup>

In other cases, a corporation has been declared nonexistent, simply because it did not have a business place or do business in the state and therefore omitted registration or filing for license. Isolated language to this effect in the United States has been noticed abroad<sup>100</sup> but must be considered inexact. However, such a deviation from the general behavior of courts has been observed in a few Latin-American jurisdictions, particularly on the part of the Mexican Federal Tribunal.<sup>101</sup> Such restriction has been the object of a declaration on juridical personality of foreign companies, opened for signature by the Pan-American Union on June 25, 1936, recently ratified by the United States, Chile, Dominican Republic, Ecuador, El Salvador, Nicaragua, Peru, and Venezuela.<sup>102</sup> It declares:

"Companies<sup>103</sup> constituted in accordance with the laws of one of the Contracting States, and which have their seats in its territory, shall be able to exercise in the territories of the other Contracting States, notwithstanding that they do not have a permanent establishment, branch or agency in such

<sup>99</sup> Yugoslavia: C. Com. § 503, criticized by EISNER, 1 *Symmikta Streit* at 293.

<sup>100</sup> LOEB, *Clunet* 1922, 319, and BEITZKE, *Jur. Personen* 164 have cited Texas Rev. Stat. 1911, 1318 (corresponding to art. 1536 Rev. Stat. 1925); *Chapman v. Hallwood Cash Register Co.* (App. Texas 1903) 73 S. W. 969, but in this case the corporation had an office in Dallas, Texas, and carried on business.

<sup>101</sup> Mexico: See cases expertly commented by SCHUSTER, 7 *Tul. L. Rev.* (1933) 341, 374, 8 *id.* 563 and more recently the decision in *Amparo Molina* (1935) 403 *Seman. Jud.* (1935) 1312; VOELKEL, 14 *Tul. L. Rev.* (1940) 52, 66.

Furthermore, "personality" is denied in:

Bolivia: Law of Nov. 13, 1886, art. 4.

Panama: Law No. 32, of Feb. 26, 1927, art. 91.

<sup>102</sup> Proclamation of the President of the United States, 55 *Statutes at Large* 1201; the text of the Pan-American declaration has also been published in *Hudson*, 7 *Int. Legislation* 355 No. 445.

<sup>103</sup> Spanish *sociedades*, see *supra* p. 10. Chile, in its "understanding" in signing, speaks of *sociedades mercantiles*.

territories, any commercial activity which is not contrary to the laws of such States and to enter all appearances in the courts as plaintiffs or defendants, provided they comply with the laws of the country in question."

The word "notwithstanding" directly refers to the mentioned case, namely, where the corporation has no business ties with the country, although its solution would seem a commonplace.

Finally, it occurs frequently within and without the United States that a foreign corporation is not permitted to bring an action, as one of the penalties for noncompliance with the statutory requirements for doing intrastate business.<sup>104</sup> This is comparable to the refusal by French courts of the right of suit to foreign corporations not recognized through decree or treaty, a refusal strongly disapproved in the French literature.<sup>105</sup>

In connection with the Pan-American resolution mentioned above, the United States has declared its "understanding" that the companies "shall be permitted to sue or defend suits of any kind without the requirement of registration or domestication." Certainly what was meant was "authorization" rather than "domestication" in the proper sense. Does the declaration mean that the resolution extends to the case of unauthorized business? This, in fact, was the significance of an analogous resolution by the Institute of International Law as early as 1891.<sup>106</sup> But another "understanding" of the Chilean Delegation points to the contrary conception, and many states of this country deny the right to sue to non-complying corporations.

Also the recommendations of the Council of the League of Nations of 1923<sup>107</sup> demanded the faculty to appear as plaintiff or defendant only for such persons, firms and

<sup>104</sup> See *infra* Chapter 23, pp. 203ff.

<sup>105</sup> See PILLET, 2 *Traité* §§ 745, 746.

<sup>106</sup> 11 *Annuaire* (1889-1892) 171 arts. I and III.

<sup>107</sup> League of Nations Document, C. 36. M. 21; 1929 II No. 7.

companies as are permitted to be established, but the International Chamber of Commerce, in its proposals to the Universal Economic Conference in Geneva, 1927, desired to secure the right of standing in court for all companies.

None of these statements refers to the other half of the so-called capacity to sue and to be sued, viz., the capacity to perform procedural acts. The distinction is more important than in the case of individuals, because even in countries applying the personal law to the procedural competence of physical persons, organizations usually are subject to the local law of procedure. This is particularly remarkable in the case of noncorporate associations.

*Illustration:* An English partnership is capable, under the English court rules, of being a party and, therefore, has the right to sue in a German court. The plaintiff partnership failed to send in particulars for registration under the English Registration of Business Names Act, 1916, and thus lost enforcement of its rights arising out of any contract.<sup>108</sup> But this regards only the procedural disability of the firm; "the capacity of being a party according to English law engenders procedural capacity in Germany even though it is missing under English law." LG. Berlin (December 13, 1929), IPRspr. 1930 No. 20.

(b) *Single acts.* Regulations requiring foreign corporations to register or to obtain a license generally apply only if the business to be carried on reaches some degree of permanence, allowing "single" or "isolated" acts unconditionally.<sup>109</sup> The boundaries of the permitted zone vary a little, but ordinarily activities such as taking orders from customers by letter, or by traveling agents,<sup>110</sup> acquiring,<sup>111</sup> holding,<sup>112</sup> or administer-

<sup>108</sup> LINDLEY, *Partnership* (ed. 10) 159.

<sup>109</sup> Cf. Restatement § 167 comment.

Argentina: C. Com. art. 285.

El Salvador: C. Com. art. 299.

For other Latin-American countries, see VOELKEL, 14 Tul. L. Rev. (1940) at 47 ns. 21, 22; 55 n. 52.

<sup>110</sup> United States: This frequent assumption follows the English distinction



ing<sup>113</sup> property, and other simple exercises of the corporate capacity, are included.

In the United States, no comprehensive definition of doing business exists, but approximate agreement obtains on certain definite rules or principles which are "suggestive and illustrative rather than definitive," as the draftsmen of the Uniform Foreign Corporations Act have stated. Their tentative definition:

"The term 'doing business' means the transaction by a foreign corporation of some part of its business substantial and continuous in character and not merely casual or occasional,"

has been supplemented by an enumeration of permitted activities of a rather liberal extent.<sup>114</sup>

On the other hand, there are certain outstanding cases in

made for purposes of jurisdiction and taxation in *La Bourgogne* [1899] P. 1; [1899] A. C. 431; *The Holstein* (1936) 155 L. T. R. 466. See, for example, *West Pub. Co. v. Superior Court of San Francisco* (Cal. 1942) 128 Pac. (2d) 777: "mere solicitation of business, advertising or demonstrating products, listing of names of the company in the telephone directory or the company having its name on the door of an office or presence of a company official on personal business. . . ."

Canada: Alberta: Foreign Companies Act, 3 Rev. Stat. 1922, 2019 s. 4 (3): "The taking orders by travellers for goods, wares or merchandise to be subsequently imported into Alberta to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence if the company has no resident agent or representative and no warehouse office or place of business in Alberta . . . shall not be deemed to be carrying on business under the meaning of this Act." Similarly, British Columbia: Rev. Stat. 1936, c. 42, s. 178, and Nova Scotia: Rev. Stat. 1923, c. 173, s. 30. But the Alberta provision was narrowed: Companies Act, Rev. Stat. 1942, c. 240, s. 133 (b). Extremely narrow, Manitoba: Companies Act, Rev. Stat. 1940, c. 36, s. 452.

Austria: OGH. (May 30, 1899) Amtl. S. No. 88, 10 Z.int.R. 76; (Feb. 5, 1929) Rspr. 1929, 49 No. 70, cited by WALKER 204 n. 12.

Brazil: Sup. Trib. (May 25, 1927) 87 Revista Dir. 88 (sale of goods by an American business corporation not authorized to do business).

Rumania: Cass. (June 8, 1937) No. 1428; Clunet 1938, 961.

<sup>111</sup> E.g., taking valid title to property in stock; after resale the buyer has a good title: *Crockin v. Boston Store of Fort Myers* (Fla. 1940) 188 So. 853.

<sup>112</sup> Austria: High Administrative Court (June 30, 1936) 65 J. Bl. 505.

<sup>113</sup> YOUNG 91, citing 4 LAURENT § 137.

<sup>114</sup> National Conference, Handbook 1934, 287, 304 with a valuable table of cases.

which neither the constitutional freedom of interstate and foreign commerce nor the usual statutory faculty of doing single acts may be relied on. Thus, intrastate business is assumed to exist if a warehouse is maintained in the state, from which goods are shipped to customers in the state,<sup>115</sup> or if a foreign corporation sells and, through its agent in the state, installs machinery,<sup>116</sup> constructs highways,<sup>117</sup> supplies concrete pipe for a sewer job,<sup>118</sup> or installs fixtures.<sup>119</sup> But a transaction made by an agent in the state is likely not to be regarded as doing business, if the authority of the agent is limited to soliciting and transmitting applications.<sup>120</sup>

In the Latin-American countries, the main criterion, as will be seen, is the carrying on of a branch or agency in the territory.<sup>121</sup> Bolivia, however, is said to deny even the minimum of tolerance to any nonregistered foreign company.<sup>122</sup>

### 3. Is the Extent of Recognition Determined by Domestic Law?

All particular solutions described above evince the simple principle that the foreign personal law, if recognized, is applied exactly as it is established by the state of creation. The smooth operation of this principle is, however, jeopardized by frequent broad references to the concepts and measures of

<sup>115</sup> Where the goods are shipped from another state, the corporation is recognized as engaged in interstate commerce, see *Caldwell v. North Carolina* (1903) 187 U. S. 622.

<sup>116</sup> 2 BEALE 843 § 179.15.

<sup>117</sup> *Amos D. Bridge's Sons, Inc. v. State of New York* (1921) 188 App. Div. 500, *aff'd*, 231 N. Y. 532.

<sup>118</sup> *Loomis v. People's Construction Co.* (1914) 211 Fed. 453.

<sup>119</sup> *George M. Muller Mfg. Co. v. First National Bank of Dothan* (1912) 176 Ala. 229, 57 So. 762.

<sup>120</sup> *Union Trust Co. of Md. v. Rodeman* (1936) 220 Wis. 453, 264 N. W. 508 at 512.

<sup>121</sup> See *infra* Chapter 23, I. Guatemala: C. Com. (1942) art. 416 shares in this view. In addition, the C. C. (1933) art. 25, continuing former provisions, establishes a series of duties for foreign companies and associations "habitually" carrying on business in the Republic.

<sup>122</sup> Bolivia: Law of Nov. 13, 1886, art. 4; ARAOZ, 1 *Nuevo Digesto de Legislación Boliviana* (1929) 24; VOELKEL, 14 *Tul. L. Rev.* (1940) at 56.

the law of the forum. Constitutions, statutes, and courts are prone to declare that a foreign juristic person cannot have more rights than domestic persons have.

In Europe this is an opinion of long standing, followed by some eminent writers.<sup>123</sup> Michoud, the author of the French standard work, regards it as a "principle generally accepted that foreign corporations ought not to enjoy treatment more favorable than the French corporations," which principle, in fact, "constitutes an exception to the personal law."<sup>124</sup> If German courts, in recognizing the existence and capacity of a foreign business association, describe its status as similar to that of a German stock corporation or a limited partnership,<sup>125</sup> they try only to make the personality of the enterprise clear. In one case, however, a banking corporation of Tennessee was refused recognition because it did not seem to conform to any legal type of association at the forum—a decision without authority.<sup>126</sup> Of English courts, it is only known that, not accustomed to regard the monarchical state of England as a person, they would not allow the King of Spain to sue as personifying the Spanish *fiscus*,<sup>127</sup> but required that he should act as a royal corporation sole, like the Crown of England<sup>128</sup> or as a trustee for his subjects, or on his own behalf.<sup>129</sup> But this intolerance pertained to the overextended procedural concepts of British judges.<sup>130</sup>

<sup>123</sup> MAMELOK 76; ASSER-RIVIER, *Eléments* 202; YOUNG 92, 94; POULLET in Clunet 1904, 828 and in Manuel 254 § 217. See also PILLET, *Personnes Morales* 91 § 66.

<sup>124</sup> MICHOD, 2 *Personnalité Morale* 352 § 329.

<sup>125</sup> See for instance, RG. (Dec. 16, 1913) 83 RGZ. 367; RG. (June 3, 1927) 117 RGZ. 215 at 217; RG. (Oct. 29, 1938) 159 RGZ. 33 at 46.

<sup>126</sup> OLG. Hamburg (June 23, 1903) 14 Z.int.R. 64, criticized by BEITZKE, *Jur. Personen* 60 n. 16.

<sup>127</sup> *United States v. Wagner* (1867) 2 L. R. Ch. 582 per Cairns, J.; cf. YOUNG 180.

<sup>128</sup> *King of Spain v. Hullett & Widder* (1833) 7 Bli. N. S. 359, 1 Cl. & F.

333.

<sup>129</sup> *Hullett v. King of Spain* (1828) 2 Bli. N. S. 31, 28 R. R. 56.

<sup>130</sup> YOUNG 299. Contrary to this spirit, C. M. SCHMITTHOFF, *Textbook of*

Drafts of the Swiss Civil Code adopted the said doctrine and granted corporations and establishments having foreign headquarters civil personality only within the limits determined by Swiss law.<sup>131</sup> This idea was criticized and omitted in the final text, but it has been incorporated in the Civil Code of Liechtenstein<sup>132</sup> and the Commercial Code of Yugoslavia. The latter recognizes the capacity of foreign companies to no greater extent than is granted to domestic companies of a similar or kindred type, serving similar or kindred purposes. Foreign types unknown to the internal law are subjected to the provisions involving the next related domestic type.<sup>133</sup> If the foreign type cannot be fitted into any of the domestic categories, it is treated like an ordinary stock corporation.<sup>134</sup>

The recent Civil Code of Peru<sup>135</sup> joins this group, stating that "the capacity of foreign juristic persons cannot be contrary to the public policy nor more extensive than that granted to nationals," and, while the Latin-American statutes following the Spanish model regularly set forth the principle that (recognized) foreign corporations enjoy the same private rights as national individuals,<sup>136</sup> certain ones, such as the Constitution of Venezuela of 1936 (art. 37), add that they have in no case greater rights than nationals. The tentative drafts of the Restatement (Nos. 1-3, § 171) declared that:

"No power given to a foreign corporation by the law of the state of incorporation can give it a right to do any act which a corporation as such is not permitted to do by the law of the state in which the act is done."

the English Conflict of Laws (London 1945) 331 tries to apply Dicey's proposition that a foreign status unknown to the English law is not recognized.

<sup>131</sup> Preliminary Draft (1900) art. 70; Draft of March 3, 1905, art. 1748. See criticism by SAUSER-HALL, 50 Bull. Soc. Législ. Comp. (1921) 246.

<sup>132</sup> Liechtenstein: P. G. R. art. 235 par. 3.

<sup>133</sup> Yugoslavian C. Com. of 1937, § 502 par. 2, cf. EISNER, 1 Symmikta Streit (1939) 292. The Japanese C. Com. art. 255 is similar.

<sup>134</sup> Yugoslavia: C. Com. § 500 pars. 3, 4.

<sup>135</sup> Peru: C. C. (1936) Tit. Prel. art. IX par. 2.

<sup>136</sup> Spain: C. Com. art. 15, see TRÍAS DE BES 68.

The final text has cancelled this statement, but comment b of § 165 says that:

"A state usually restricts the activities of a foreign corporation to the same extent to which it restricts the activities of a domestic corporation."

In fact, most American jurisdictions have a clause in their constitutions or statutes enouncing one of the following versions of the same idea:<sup>137</sup>

(a) Any foreign corporation shall have the same rights and privileges as are enjoyed by domestic corporations of the same or similar character,<sup>138</sup> or

No foreign corporation shall have any greater rights or privileges than those enjoyed by domestic corporations of a similar character.<sup>139</sup>

(b) No foreign corporation shall be allowed to transact business in the state on more favorable conditions than are prescribed by local law for similar domestic corporations.<sup>140</sup>

(c) No foreign corporation may carry on any business which a domestic corporation is prohibited from doing,<sup>141</sup> or

The exercise of which is either prohibited to domestic corporations or against the public policy of the state,<sup>142</sup> or

<sup>137</sup> A survey as of the year 1923 was made by the French writer LEPAULLE, *Condition des sociétés étrangères* 161, 164.

<sup>138</sup> Arizona: Code (1939) § 53-804.

Idaho: Code (1932) § 29-508.

Louisiana: General Statutes (1939) § 1246.

South Carolina: Code (1942) § 7764.

Texas: Revised Civil Statutes (1925) art. 1532.

<sup>139</sup> Montana: Constitution (1889) art. XV § 11.

Oregon: C. C. (Compiled Laws Ann.) (1940) § 77-318.

<sup>140</sup> Arizona: Constitution (1912) art. XIV § 5.

California: Constitution (1879) art. XII § 15.

Kentucky: Constitution (1891) § 202.

Utah: Constitution (1895) art. XII § 6.

Washington: Constitution (1889) art. 12 § 7.

<sup>141</sup> Maine: Revised Statutes (1944) c. 49 § 125.

Maryland: Annotated Code (1939) art. 23 § 118.

Ohio: Code (1938) § 8625-16.

Oklahoma: Constitution (1907) art. IX § 44.

Virginia: Constitution (1902) § 163.

<sup>142</sup> Georgia: Code (1933) § 22-1503.

Foreign corporations must be organized for a purpose for which local corporations may be organized.<sup>143</sup>

(d) Many states have some slight variations, such as combining the "same rights and privileges" clause with the clause that a foreign corporation cannot transact business forbidden to a domestic corporation,<sup>144</sup> or

(e) Foreign corporations are subject to all liabilities, restrictions, and duties imposed on like domestic corporations and have no other or greater powers.<sup>145</sup>

The emphasis in these statutes is on the penalties and restrictions rather than the powers and privileges.

What do all these rules mean? Do they affect the recognition of the foreign-created personality?

It would seem so in a few instances. Among European cases, there are some that have already been considered and refuted, such as the Dutch decision rejecting the legal personality of a French partnership because the law of the forum knew only partnerships without full personality;<sup>146</sup> the court failed to see that as the party was not a Dutch partnership, Dutch law could not apply. The Appellate Court of Brussels recognized a Dutch association for nonprofit purposes only since a Belgian law shortly before had introduced similar associations;<sup>147</sup> this was not a convincing reason, as was noted, since the same court denied legal existence in Belgium to a French trade union,<sup>148</sup> although the analogous "professional syndicates" had been instituted in Belgium.<sup>149</sup>

<sup>143</sup> Kansas: Statutes (1935) § 17-503.

<sup>144</sup> Illinois: Bus. Corp. Act (1933) § 157-103.

Michigan: General Corporation Act (1931) § 94.

Missouri: Revised Statutes (1939) § 5072.

New Mexico: Statutes (1941) §§ 54-801, 54-804.

<sup>145</sup> Arkansas: Pope's Digest (1937) c. 37 § 2249.

Colorado: Statutes (1935) c. 41 § 110.

Indiana: Annotated Statutes (1933) § 25-302.

Iowa: Code (1946) § 494.14.

Mississippi: Code (1942) tit. 21 § 5341.

<sup>146</sup> Rb. Amsterdam (Dec. 19, 1924) 13 Bull. Inst. Int. (1925) 279 § 4225.

<sup>147</sup> App. Bruxelles (June 9, 1925) Pasirisie 1925.2.157.

<sup>148</sup> App. Bruxelles (May 4, 1932) 1932.2.221.

<sup>149</sup> DUBOIS-CLAVIER, Clunet 1933, 199.

Because in Illinois domestic banks were forbidden to hold stock in another bank corporation, the Supreme Court of Illinois held that a foreign bank corporation licensed to do business was not authorized to purchase bank stock, purchase and transfer of the stock being "*ultra vires* and void."<sup>150</sup> The Court thus directly denied the corporate powers acquired in another state. But, if ordinarily the theory of special powers and the doctrine of illegality should be clearly separated,<sup>151</sup> this is doubly needed where a legal prohibition is territorially limited. The true solution was simply to extend the policy of Illinois, viz., that no bank should hold stock in another bank, to the branch of a foreign bank. On the same line, it was declared public policy in Illinois that no corporation, whether domestic or foreign, should engage in the business of buying and selling real estate, although the statute seemed not to envisage foreign corporations.<sup>152</sup> Unincorporated associations, whether domestic or foreign, have been held excluded from writing insurance in Idaho.<sup>153</sup> A foreign corporation, authorized in Michigan to do telegraph business was not granted a concession for other, viz., telephone, business "for which a domestic corporation could be formed," but the court saw clearly that what the statute intended was to prohibit one corporation from engaging in both kinds of business, and this policy was decisive.<sup>154</sup>

The obvious conclusion may be verified by counterproof. Although in Illinois a corporation cannot be organized to do different classes of insurance business, there is no implied prohibition for a New York corporation<sup>155</sup> to do such multi-

<sup>150</sup> *Golden v. Cervenka* (1917) 278 Ill. 409 at 440, 116 N. E. 273 at 286.

<sup>151</sup> CARPENTER, "Should the Doctrine of *Ultra Vires* be Discarded?" 33 Yale L. J. (1924) 49, 68.

<sup>152</sup> *Evans v. McKinney* (1923) 308 Ill. 100, 139 N. E. 99. See for real estate brokerage, *Warren v. Interstate Realty Co.* (1914) 192 Ill. App. 438.

<sup>153</sup> *Intermountain Lloyds v. Diefendorf* (1931) 51 Ida. 304, 5 Pac. (2d) 730.

<sup>154</sup> *Amer. Telephone and Telegraph Co. v. Secretary of State* (1909) 159 Mich. 195, 123 N. W. 568.

<sup>155</sup> *People v. Fidelity and Casualty Co.* (1894) 153 Ill. 25, 38 N. E. 752.

form business in Illinois. Frequently, objections against the purpose or the structure of a foreign corporation divergent from domestic legislation, have been raised but rejected. A corporation organized in another state solely for religious, missionary, educational, and charitable purposes was held capable of acquiring and holding land in California without complying with certain provisions of the California Civil Code.<sup>156</sup> A Kansas corporation having its capital stock divided into shares of no fixed nominal par value, was recognized in Missouri,<sup>157</sup> and a Delaware corporation, having a mixed stock structure, was admitted in California,<sup>158</sup> despite divergent domestic legislation. The New York courts have permitted an insolvent foreign corporation to make an assignment to creditors, prohibited to New York corporations,<sup>159</sup> and so forth.

The reasonable intention of legislatures and courts is to segregate within the territorial enacted law a portion embodying imperative public policy to be applied to all corporations, whether foreign or domestic, doing business in the state. The intention is not, however, to restrict recognition otherwise than by the well-known provisions concerning the doing of business. Only on this basis can the sanction of violations be adequately determined.

Great help in avoiding harmful applications of the existent incautious provisions has come from the popular statement that the failure of a state to provide domestic corporations with the same powers, or to authorize them to be formed for

<sup>156</sup> *General Conference etc. v. Berkey* (1909) 156 Cal. 466, 105 Pac. 411.

<sup>157</sup> *State ex rel. Standard Tank Car Co. v. Sullivan* (1920) 282 Mo. 261, 221 S. W. 728, 732.

<sup>158</sup> *Commonwealth Acceptance Corp. v. Jordan* (1926) 198 Cal. 618, 246 Pac. 796. The Constitution of Washington does not warrant exclusion of a foreign corporation because it is permitted to issue common stock of different classes not allowed domestic corporations, *Fibreboard Products v. Hinkle* (1928) 147 Wash. 10.

<sup>159</sup> *Vanderpoel v. Gorman* (1894) 140 N. Y. 563, 35 N. E. 932.



the same purposes, is not presumed to exclude a foreign corporation from exercising activities according to its charter.<sup>160</sup>

These observations suffice for the limited purpose of the present inquiry, which is not concerned with the delicate question how far public policy goes or should go. Evidently all doctrines and provisions forcing all foreign organizations into a domestic mould, are ill-framed and would be quite dangerous but for the good sense of judges throughout the world. To ban or degrade foreign types of associations would entirely deform the principle that the law of the charter governs. The progress of international intercourse which has engineered the "liberal" theory of recognition, in turn, depends upon a liberal concept of recognition. Moreover, the parties who organize an enterprise must choose its juristic shape and adjust its structure in accordance with the types offered by the local law and are unable to comply with every idea of legislators in all parts of the globe. They should not, in fairness, have to give thought to any law except that of creation, except perhaps that designed to govern the principal place of business.

The retrogression would be worse, if these clauses under consideration should mean that domestic corporations would be protected against competition<sup>161</sup> by other means than taxation and licensing for business. This would largely exceed the scope of the famous reciprocity or "retaliatory" clauses.

If the problem, instead, is confined to its proper domain, internal law will be held to affect the original nature of a foreign organization only on the ground of a vital public policy, important enough to overcome the needs of trade or

<sup>160</sup> *Stevens v. Pratt* (1882) 101 Ill. 206, *Stump v. Sturm* (1918) 254 Fed. 535; 2 BEALE § 167.33; FLETCHER, 17 Cyc. Corp. § 8334 n. 45 and cases *supra* ns. 151-153.

<sup>161</sup> This is the interpretation by LEPAULLE, *supra* n. 137, 164 who is apprehensive of the sphere of discretion left to the administrative agencies.

spiritual and cultural interchange. The theory of comity should at last lose its grip.

There is, however, a reverse side of the thesis that "foreign juristic persons enjoy the same private rights as those of the same class" formed at the forum. De Becker believed it was "the awkward result" of the Japanese rule, formulated in these terms, that foreign corporations may enjoy in Japan rights which they cannot enjoy at home.<sup>162</sup> This is not the meaning, of course. But it has likewise been observed in this country that the domestic law of the state where activities are exercised, increases the powers of a foreign corporation in such matters as usury, taking land by devise, making preferential payments, and eminent domain.<sup>163</sup> Thus, the well-settled rule that a state never concedes permission to a foreign corporation to go beyond its charter<sup>164</sup> would be overridden. However, all such results may be explained, each one separately, in other ways. Regrettably, this matter exceeds the scope of this treatise.

#### IV. THE POWERS OF THE CORPORATION AND OF ITS AGENTS

There is no disagreement on the principle that the capacity of a corporation and the authority of its principal representatives are primarily determined by its personal law.

##### I. Powers of Corporation

Powers denied to a corporation by the law of incorporation are denied it in any country.<sup>165</sup> American courts say, "Comity does not add powers but only recognizes existing ones." Con-

<sup>162</sup> DE BECKER, *Int. Priv. Law* 62.

<sup>163</sup> Note, 40 *Col. L. Rev.* (1940) 1225.

<sup>164</sup> See next note.

<sup>165</sup> *Relfe v. Rundle* (1880) 103 U. S. 222, 225; 2 BEALE § 165.1; PILLET, *Personnes Morales* 105; RAAPE 136; TRIAS DE BES 386. For instance, a foreign company in liquidation has the limited capacity of the law of charter: App. Athens (1929) *Clunet* 1931, 494.

flicts, however, are immediately presented by the fundamentally different conceptions of common and civil law in construing corporate powers.

In modern civil law, capacity to have rights and powers, pertains to juristic persons in the same full extent as to individuals, excepting natural abilities such as capacity to marry and to make a will, but including name, honor, and credit.<sup>166</sup> For the benefit of third persons dealing with corporations, the laws usually freeze this full capacity into a "formal," i.e., an absolutely fixed sum of faculties, independent of the purposes of incorporation and restrictions imposed through charter or by-laws. Even though a juristic person *ought* not to make certain transactions according to the constitutional documents and resolutions of stockholder meetings, it *can* yet do them with legal effect. Any transaction with third persons, therefore, is valid, at least if there is no fraudulent collusion between the agents and the third parties.

At common law, a juristic person has no more than the special capacity conferred upon it by the act of creation in view of its particular purposes. Whenever a corporation enters into a transaction beyond the prescribed radius of its activity, it acts "*ultra vires*," without power, and the act in principle is legally inexistent as nobody's act. An English judge believed this view self-evident and "not a mere canon of English municipal law but a great and broad principle which must be taken as part of any system of jurisprudence."<sup>167</sup> He allowed a minority of stockholders in a Turkish railway corporation to sue the directors with the demand to restrain them from making payments ensuing from a majority vote in a general meeting, the vote being "*ultra vires* of the majority." The court thus not only interfered with the internal affairs of a

<sup>166</sup> UDINA, Elementi No. 80.

Quebec: C. C. art. 352, 358, 17; cf. 2 JOHNSON 177.

<sup>167</sup> Pickering v. Stephenson (1872) 14 L. R. Eq. 322.

foreign corporation but applied an imagined Turkish law similar to the English.

The French Conseil d'Etat has developed a somewhat comparable doctrine of "specialty" (*principe de spécialité*) limiting the powers of public administrative boards that have legal personality, in accordance with their specific purposes. But this doctrine is intended to foster good administration and by no means to serve as a rule of private law or as a restriction on capacity.<sup>168</sup>

This contrast must be realized in applying the conflicts rule. It follows that American or English courts should recognize the formal, general powers of Belgian, Brazilian, French, and other civil law corporations, and that courts in civil law countries should note the limited, special powers of American and British corporations. The latter effect is actually well known in Europe.<sup>169</sup>

All theories of special powers, however, involve manifest dangers to third persons who act in good faith, and the more so in extraterritorial operation. The basic principle of the personal law in itself rightly disregards whether third persons do or do not know the extent of corporate capacity. The Supreme Court of the United States once arrived at this result by the presumption or fiction that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with which he voluntarily contracts as that government authorizes."<sup>170</sup> But the concealed limitation to the "*vires*" inherent in the common law doctrine of special powers, has caused inconveniences more acutely felt in the United States than in England, because of the close

<sup>168</sup> See RIGAUD, 10 Répert. 271 No. 151.

<sup>169</sup> Trib. civ. Bruxelles (Dec. 6, 1893) Clunet 1894, 916 (English memorandum of association); approved in France by PILLET, *Personnes Morales* § 166; in Germany by M. WOLFF, IPR. 72 and others; in Switzerland by STEIGER, 67 ZBJV. (1931) 317.

<sup>170</sup> Canada Southern R. Co. v. Gebhard (1883) 109 U. S. 527.

co-existence of so many states which are the common territory of so many business corporations. Judicial inventiveness has developed an abundance of remedies tempering the result and particularly effective in case a corporation acts outside of its charter state.<sup>171</sup> Thus, the courts presume that a particular contract entered into by a corporation is within its powers. More important, many prohibitions are construed as applying to corporate action only in the state of incorporation, e.g., statutory prohibitions against taking lands by will or general assignment.<sup>172</sup> Such limitations present a hard task of interpretation, and no smooth formula has been found to designate generally which parts of the charter, the by-laws, or the general law "migrate with the corporation."<sup>173</sup> More adequate relief is furnished by skillful drafting of charters and by-laws covering every reasonably expected activity. Moreover, despite omission of required formalities or transgression of prescribed purposes, contracts are held valid on the ground of assumed "general powers" of the corporation for the benefit of other parties who act in good faith. In addition, fully executed contracts are safe, and those executed by one party are protected in most jurisdictions through the estoppel doctrine.<sup>174</sup> What remains prevailingly unenforceable after all, are only executory *ultra vires* contracts, and in some juris-

<sup>171</sup> Restatement § 156 comment c; *id.* § 165 comment a; 2 BEALE 758 § 165. The purpose of protecting third persons must be borne in mind. E.g., as the Nevada Act of March 24, 1909 (Statutes of Nevada, 1908/1909, p. 251), gave priority to certain claims against an insolvent banking corporation, the Ninth Circ. Ct. of Appeals in *Washington-Alaska Bank v. Dexter et al.* Bank (1920) 263 Fed. 304 said that "depositors and others who dealt with the bank were not required to search the statute of Nevada to ascertain what their rights were. They were entitled to rely upon the laws of the territory where the bank was engaged in business."

<sup>172</sup> 2 BEALE 757-762; Restatement § 165 comment a; Note in 40 Col. L. Rev. (1940) 1211-1215. Provisions against lending money in excess of a fixed rate are likewise interpreted as territorial, but this regards illegal and not *ultra vires* transactions.

<sup>173</sup> Cf. Note, 40 Col. L. Rev. (1940) 1218.

<sup>174</sup> For a recent case of denial that defense by estoppel is barred by estoppel see *Pattison v. Illinois Bankers Life Ass'n* (1935) 360 Ill. 616, 196 N. E. 882.

dictions also those executed on one side, still with exceptions. Where incorporation has been obtained in several states, the corporation is not allowed to plead lack of power, if it possesses it in any one of these states.<sup>175</sup> Presumptions are in favor of general and unlimited capacity, although it is not presumed that a foreign corporation of a particular type or class has power not necessarily or usually possessed by corporations of the kind in question.<sup>176</sup> There are even other ways to evade the *ultra vires* theory.<sup>177</sup>

Well meaning and widely opportune though all these developments are, the "harsh and inflexible" doctrine of special capacities has not been improved but broken; it survives in incoherent fragments, involving differences in the various courts as well as "confusion, uncertainty and injustice."<sup>178</sup>

Under these circumstances radical reforms have been widely sought and in some states achieved in fact, partly on the suggestion of the Uniform Business Corporation Act by exempting most classes of cases from the doctrine; partly, as in California, on the more adequate conception that corporations have general powers although the actual authority of the directors may remain bound to the specified purposes.<sup>179</sup>

For all these reasons, a conflicts rule is needed even within this country. It has been held in a single case by the Missouri

<sup>175</sup> Mackay v. New York etc. R. Co. (1909) 82 Conn. 73, 72 Atl. 583.

<sup>176</sup> 14a C. J. § 3943.

<sup>177</sup> See 2 BEALE 762; KESSLER, 5 Z.ausl.PR (1931) 538.

<sup>178</sup> CARPENTER, "Should the Doctrine of Ultra Vires Be Discarded?" 33 Yale L. J. (1923) 49-68; STEVENS, "Ultra Vires," 4 Cin. L. Rev. (1930) 419, 439.

<sup>179</sup> California: C. C. § 345, as amended by Stat. 1931, 1802; see the important comment by BALLANTINE, "Drafting a Modern Corporation Law," 19 Cal. L. Rev. (1931) 465, 473.

Illinois: Ann. Stat. (Smith-Hurd 1934) c. 32 § 157.8, as amended June 30, 1945.

Michigan: 15 Stat. Ann. (1935) § 21.11, Gen. Corp. Act, Publ. Acts 1935, No. 194 § 11 par. 1.

Ohio: Gen. C. (1938) § 8623-8.

Pennsylvania: Stat. (Purdon 1936) tit. 15 § 2852-302. On the powers of banks see Note, 15 Cin. L. Rev. (1941) 105.

Supreme Court that the law of the place of contracting rather than that of the place of performance determines whether or not a corporation, when sued on a contract, is precluded from setting up the defense of *ultra vires*.<sup>180</sup> The law of the state of incorporation was disregarded.<sup>181</sup> This solution has been generalized in the Restatement<sup>182</sup> in the highly enigmatic rule that "the effect of an act directed to be done by a foreign corporation is governed by the law of the state where it is done." If we give the rule the most reasonable construction, the compass of the powers of a corporation is determined by the law of the incorporating state, but the effect of an act beyond such powers is determined by the local law. The Missouri Court, however, reached its result quite as the former Italian Commercial Code did,<sup>183</sup> by simply applying the law of the place of contracting to the capacity of legal persons, although the personal law governs their existence.

The systems generally subjecting capacity to the personal law, necessarily have to use other methods. The case was not foreseen in the older provisions under which individuals incompetent by their personal laws, nevertheless are bound by contracts concluded with third persons in the forum. A few German and Swiss authors, opposed by others, however, have advocated analogous application of these provisions to corporations, so that an *ultra vires* contract made by an American corporation in Germany would be as valid as one concluded by a German corporation with full powers.<sup>184</sup> This analogy

<sup>180</sup> *Illinois Fuel Co. v. Mobile & Ohio R. Co.* (1928) 319 Mo. 899, 8 S. W. (2d) 834, cert. denied, 278 U. S. 640.

<sup>181</sup> GOODRICH 268 § 105; cf. 2 BEALE 1215 n. 9.

<sup>182</sup> Restatement § 166.

<sup>183</sup> DIENA, 1 *Dir. Com. Int.* 313; *id.*, 2 *Princ.* 287, 293; CAVAGLIERI, *Dir. Int. Com.* 249.

<sup>184</sup> WIELAND, 43 *Z. Schweiz. R.* 225; KESSLER, 3 *Z. ausl. PR.* (1929) 769; NUSSBAUM, *D. IPR.* 191 n. 6; RÜHLAND, 45 *Recueil* (1933) III 446; M. WOLFF, *IPR.* 72 n. 16; BEITZKE, *Jur. Personen* 118.

*Contra*: NEUMEYER, 1 *Int. Verwaltungs R.* 176; 1 FRANKENSTEIN 486; VON STEIGER, 67 *ZBJV.* 253; SCHNITZER, *Handelsr.* 115; RAAPE 137.

has been embodied in the recent codifications of Poland, Liechtenstein, Yugoslavia,<sup>185</sup> and perhaps Italy.<sup>186</sup>

This rule also refers capacity to the law of the place of contracting, but only if this place is within the forum. In addition, the outcome differs essentially from the American, since the theory of *ultra vires* is abolished rather than mitigated for the purpose of recognition. It might be objected to this radical result that foreign juristic persons are more easily recognizable than foreign individuals and that persons dealing with any corporation may well be required to do their best in inquiring into its nature and purposes.<sup>187</sup> However, international commerce is interested in eliminating such costly and delaying duties. Foreign courts may be excused when they avoid both the unmitigated English and the entangled American doctrines.

This has been strikingly confirmed by the Californian reform of 1931. The defense of *ultra vires* has been abrogated also in case of foreign corporations:

"This section shall extend to contracts and conveyances made by foreign corporations in this state by foreign corporations."  
(Cal. Code § 345, last paragraph)

Similarly, the General Corporations Act of Michigan of 1935, on the basis of the Uniform Business Act, excludes the plea of *ultra vires* made by a foreign corporation against a person not being a director, officer, or shareholder and not having an actual knowledge of the *ultra vires* character of the act.<sup>188</sup>

<sup>185</sup> Poland: Int. Priv. Law, art. 3.

Liechtenstein: P. G. R. art. 235 par. 6.

Yugoslavia: C. Com. § 502 par. 2, cf. criticism by EISNER, 1 Symmikta Streit 292.

<sup>186</sup> Disp. Prel. (1942) art. 17 par. 2, speaking of aliens, does not seem to refer to both paragraphs of art. 16, but may be nevertheless so interpreted.

<sup>187</sup> People v. Wiersema State Bank (1935) 361 Ill. 75, 197 N. E. 537 at the end; RABEL, 3 Zausl.PR. (1929) 810.

<sup>188</sup> 15 Mich. Stat. Ann. (1935) § 21.11, Gen. Corp. Act, Publ. Acts 1935, No. 194 § 11 par. 2.



Consistently with the suggestions made in other parts of this work, the plea of *ultra vires* ought to be governed by the law *that governs the contract*.

## 2. Legal Restrictions on the Capacity of Corporations

It is natural that the capacity of corporations may be restricted, on one hand, by general statutes of the state of incorporation and, on the other, by the law governing the particular case—which formula is more exact than to refer to the “territorial” law or that where “an act of the corporation is done.” A corporation may, for instance, take a legacy, only if it has capacity under the laws both of the charter and of succession.<sup>189</sup> Still other legislations may claim consideration, such as that of the situs or that of the place of contracting, if different from the former two.

Two widespread examples of prohibitory provisions are to be mentioned.

(a) *Acquisitions by gift or will*. The traditional mortmain legislation of the 18th and 19th centuries was inspired by the twofold consideration that a donor to church funds may deprive his family of their just inheritance, and that the continuous accumulation of wealth may dangerously increase the secular might of the Church. In more recent times, reasons of national economy have prevailed in fostering a policy to prevent any long-lived juristic person from retaining possessions needed for the general welfare. Land in particular has been regarded as an inestimable asset, limited in quantity, which ought not to be monopolized by holders who usually do not alienate their acquisitions.

In numerous countries, legal persons may not acquire property by gift or other benevolence unless authorization is obtained, if the value exceeds a certain amount or some-

<sup>189</sup> 2 BEALE 971, 1036. That this rule underlies also English and German law is shown by BRESLAUER, *Private International Law of Succession* (1937) 99.

times irrespective of the value.<sup>190</sup> Since such a provision may be a part of the law of charter, or of the law governing the donation, bequest, or devise, or of the *lex situs*,<sup>191</sup> the task of a court in selecting the applicable law may be difficult. In France, it has been held that a foreign corporation claiming any acquisition in France by donation or legacy ought to show authorization according to its personal law<sup>192</sup> and, in addition, French authorization, if it is not profit-seeking and a French family is affected, article 910 of the French Civil Code not being intended to protect a foreign family.<sup>193</sup> In the United States, it is generally held, in agreement with the prevailing rule elsewhere, that acquisitions by devise or bequest require the consent of both the charter state and that determining succession upon death, that is, the state of situs for immovables, or that of the last domicil for movables.<sup>194</sup>

Statutes protecting the family of the donor against inconsiderate disinheritance, may leave doubts respecting the law determining the family's composition. In New York, it has been convincingly argued<sup>195</sup> that it is the family con-

<sup>190</sup> England: Corporations Cons. Act, 1929, § 14; Mortmain and Charitable Uses Act, 1888.

Belgium and France: C. C. art. 910 concerning associations, not stock corporations, see Cass. (Nov. 29, 1897) D.1898.1.108; (Oct. 29, 1894) D.1896.1.145.

Italy: C. C. (1942) art. 17.

Spain: C. C. arts. 746, 748.

Portugal: C. C. art. 1781.

Germany: EG. BGB. art. 86; cf. Prussia: Ausführungsgesetz, art. 6; some Swiss cantons, etc.

The Netherlands: Arts. 947 and 1717 of the Dutch BW., treated by KOSTERS 682, have been repealed by Law of Nov. 29, 1935, par. 2.

<sup>191</sup> Cf. PILLET, *Personnes Morales* 90; LEWALD, *Questions* 68; 1 FRANKENSTEIN 486; WALKER 160; POULLET 255 § 218; RAAPE 638; BEITZKE, *Jur. Personen* 151 § 16.

<sup>192</sup> Paris (June 21, 1935) D.1936.2.17.

<sup>193</sup> Tri. civ. Seine (Nov. 14, 1936) Clunet 1938, 307; *contra*: Note, Clunet 1938, 309.

<sup>194</sup> *Christian Union v. Yount* (1879) 101 U. S. 352. FLETCHER, 17 Cyc. Corp. §§ 8377, 8378.

<sup>195</sup> *Chamberlain v. Chamberlain* (1871) 43 N. Y. 424, 433; BRESLAUER, "Conflict of Laws in Restrictions on Freedom of Taxation," 27 Iowa L. Rev. (1941) 425, 433 (adding distinctions).

ceived according to the law of the testator's domicile, that is envisaged by the statute forbidding "any person having a husband, wife, child, or parent, to devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation . . . more than one half of his or her share. . . ." <sup>196</sup>

(b) *Taking of land.* Acquisition of land by corporations <sup>197</sup> and, particularly in many Latin-American countries, acquisition by foreign states or public corporations, <sup>198</sup> is not only prohibited to corporations not licensed for doing business in numerous states, but also is subject to special authorization, without regard to consideration or value. Such restrictions arise from mortmain policy, mistrust of foreigners in general, or protection of certain districts for military reasons. Only in the last two cases should the nationality of the members be of importance.

With respect to the mortmain provisions commonly used

<sup>196</sup> Then N. Y. Laws (1860) c. 360 § 1, now Decedent Estate Law, § 17.

<sup>197</sup> United States: *Carroll v. East St. Louis* (1873) 67 Ill. 568, 16 Am. Rep. 632; Nebraska, Rev. Stat. (1943) §§ 76-402, 76-404, 76-406, 76-407; Washington, Rem. Rev. Stat. (1932) § 3862-11. For some older statutes, see FLETCHER, 17 Cyc. Corp. § 8353 n. 38.

Belgium: POULLET § 218.

Germany: See EG. BGB. art. 88 and commentaries.

Spain: Law of June 30, 1887 against religious corporations.

For the Latin-American laws, see H. ZORRAQUÍN BECÚ, *El Problema del Extranjero en la reciente legislación latino-americana* (Buenos Aires 1943) 101ff.; for the official interpretation of the Mexican Constitution, art. 27, see WHEELER, *Compendium of the Laws of Mexico* (1938) 564ff.

On the doubtful law regarding nonregistered foreign companies in Argentina, Chile and other countries, see VOELKEL, 14 Tul. L. Rev. (1940) at 62 n. 73.

<sup>198</sup> Argentina: By analogy to Brazil, 2 VICO § 85.

Brazil: Introd. C. C. art. 20; now Introd. Law (1942) art. 11 §§ 2, 3 (on the history of this legislation see ESPINOLA, 6 Tratado No. 101).

Guatemala: Decree No. 2369, of May 9, 1940; Law on Foreigners of 1936, arts. 20, 21.

Mexico: Constitution (1917) art. 27 fr. II (restrictions on religious associations, charitable and educational institutions); cf. Note, SCHUSTER, 7 Tul. L. Rev. (1933) 347.

Venezuela: Ley de Minas, of July 17, 1925, art. 30.

See for Europe, FEDOZZI 47.

in the United States, the Restatement<sup>199</sup> asserts that ordinarily statutes relating to usury, receiving land by devise, and assigning and transferring property, are interpreted as purely local in their application and do not restrict the acquisitions of a corporation in other states. Thus, even a statute of the charter state preventing corporations from taking land by will, is not applied to taking land in another state.<sup>200</sup> There is contrary authority, however.<sup>201</sup>

### 3. Authority of Agents

One of the expedients for remedying the untenable theory of territoriality was the fantastic idea that although a foreign corporation cannot "exist" in the state, it can act therein through agents.<sup>202</sup> This theory was taken seriously enough to require that the authorization of an agent, being a corporate act, must take place within the state of incorporation, and that the corporation must be organized and the agent be appointed prior to his acting.<sup>203</sup> These not even clever aberrations<sup>204</sup> are unknown to other countries and alien to the law practice of this country. Corporations are daily acting through individuals without regard to geographical frontiers and, where they act, they must exist.

Another distinction instead is essential. It is well known<sup>205</sup>

<sup>199</sup> Restatement § 165 comment a; 2 BEALE 762 § 165.3.

<sup>200</sup> *White v. Howard* (1871) 38 Conn. 342.

England: *Great West Saddlery Co. v. The King* (1921) 37 T. L. R. 436, 445.

Ontario: *McDiarmid v. Hughes* (1888) 16 O. R. 570 has held that a Quebec corporation is subject exclusively to the local law as to taking land.

<sup>201</sup> *Kerr v. Dougherty* (1880) 79 N. Y. 327; *Metropolitan Bank v. Godfrey* (1860) 23 Ill. 531; other instances are cited by 2 BEALE 762, and see LORENZEN, 6 Répert. 369 No. 463; GOODRICH § 162 n. 32; HARPER and TAINTOR, Cases 927 n. 5.

<sup>202</sup> *Bank of Augusta v. Earle* (1839) 13 Pet. S. C. 519, 588-589; *Ex parte Schollenberger* (1877) 96 U. S. 369, at 377.

<sup>203</sup> 2 BEALE 768 § 166.3.

<sup>204</sup> YOUNG 49.

<sup>205</sup> FLETCHER, 2 Cyc. Corp. § 266. For the doctrine of OTTO GIERKE, see

that there are two classes of individuals serving as representatives of corporations. One is formed by the principal officers, called directors in the British companies laws and termed "organs" of the corporate body in modern codes, following a result of Gierke's theory of "real personality."<sup>206</sup> The other class is composed of ordinary employees. The offices administered by the first group are created by the fundamental documents and form an integral part of the organization. These officers express the will and execute the potential powers of the legal entity. All other individuals acting in the name of a legal person do so by virtue of contractual relationship only, as "mere agents" or "employees."

This classification is of significance also in conflicts law. With respect to simple agents, either of a corporation or of a partnership, no special conflicts rule is needed in addition to the general rules concerning agents appointed by private declarations. The most important of these latter rules predicates that the extent of an agent's authority is determined by the law of the place where the agent acts upon his authority.<sup>207</sup>

If the principal establishes a permanent place of business in a foreign state, the law of this place has an even more decisive claim to define the authority of the agents negotiating at these places.

The powers of a corporation's principal functionaries, however, are rooted in its constitution and are comparable

his summary in 1 *Deutsches Privatrecht* (1895) 466, 469ff.; and in English, R. HUEBNER, *A History of Germanic Private Law* (transl. Philbrick) 140ff. This theory has been adopted in France; see MICHOU, 1 *Personnalité Morale* §§ 50-64 *bis*; 2 *id.* §§ 187, 189.

<sup>206</sup> "Organs" or "constitutionally authorized representatives" as a term has been used in the German BGB. § 31, Swiss C. C. art. 55, etc.

<sup>207</sup> See for first information, Restatement § 345; and as to English and comparative law, RABEL, 3 *Z.ausl.PR.* (1929) 809, 818; BRESLAUER, 50 *Jurid. Rev.* (1938) 282, 308.

to the powers of the legal person itself. Such power is defined for all individuals holding the same position and brought to public knowledge through the articles of incorporation or by-laws. Wherever a state of charter prescribes recording of corporations in a register, it requires the individual names of the officers to be included. Even in the absence of such legal precaution, it has been firmly maintained that a party dealing with the main officers of a foreign corporation should inform himself about the extent of their allotted powers. "Dealings with these companies are not like dealings with other partnerships, and . . . the parties dealing with them are bound to read the statute and the deed of settlement," though they need not do more.<sup>208</sup> This has been the true consideration underlying the common law doctrine regarding acts of directors exceeding their authority. It was the same as that embodied in the solid doctrine of Continental conflicts law, that the personal law of a corporation determines whether a director's contract is binding on the entity. In this opinion, a third party dealing with an "organ" of a foreign corporation is charged with notice of the existence and extent of this representative's constitutional power.<sup>209</sup>

For example, in the interest of all third parties, German law gives the board of directors of a German *Aktiengesellschaft* a legally defined all-inclusive authority of the broadest scope, charter restrictions upon their authority being regarded as mere instructions without external effect.<sup>210</sup> In a German

<sup>208</sup> *Royal British Bank v. Turquand* (1856) 6 E. & B. 327; *In re Hampshire Land Co.* (1896) 2 Ch. D. 743.

<sup>209</sup> See in general, 2 ZITELMANN 207; RABEL, 3 Z.ausl.PR. (1929) 810; ASSER and STREIT, *Annuaire* 1929 I 700.

Germany: ROHG. (Feb. 17, 1871) 2 ROHGE. 36; RAAPE, D. IPR. 119, 275.

The Netherlands: Rb. Haag (March 9, 1933) W. 12589; Rb. Maastricht (June 25, 1931) W. 12366 (authority of liquidators).

<sup>210</sup> HGB. § 235; Aktiengesetz § 74; Gesetz betreffend Gesellschaften mit beschränkter Haftung, of April 20, 1892, § 37, 2.

nonprofit corporation,<sup>211</sup> on the contrary, limitations on the authority of directors, if publicly registered, restrict the director's power to bind the entity. Under French law, widely followed, administrators have exactly the authority corresponding to the functions assigned to them by the charter or, in the case of silence or insufficiency of the latter's provisions, the normal scope of the enterprise.<sup>212</sup> Under the conflicts rule referring to the personal law of the corporation, all these domestic rules also govern abroad. Incidentally, it may be noted that an increasing number of German writers have borrowed from the theory of special powers the idea that a corporation should not be bound by the act of a director, exceeding the purposes of the corporation and recognizable as such by a third party.<sup>213</sup> This corresponds with the result envisaged in this country by those scholars who propose to grant corporations simply general powers, whereas agents would remain limited by the powers and purposes of corporation<sup>214</sup> and incapable of performing corporate acts beyond this line. The formation of conflicts rules would be strongly aided by such converging developments of the actually contrasting municipal systems.

In the American discussions of conflicts law, the particular position of the directors seems never to have been contemplated. The Restatement states that "the effect of an act directed to be done by a foreign corporation" is governed by the law of the state "where it is done" (§ 166), and

<sup>211</sup> BGB. §§ 30, 26 par. 2 (1).

<sup>212</sup> 2 LYON-CAEN et RENAULT § 819. In the Law of March 7, 1925, on Private Companies with Limited Liability, art. 24, however, the German model, *supra* n. 210, has been followed.

<sup>213</sup> ÖRTMANN, Allgemeiner Teil des BGB. 99; VON TUHR, 1 Allgemeiner Teil des Deutschen Bürgerlichen Rechts 527; 1 EHRENZWEIG-KRAINZ § 82 *sub* I.

Objections or doubts: PLANCK-KNOKE, 1 Kommentar § 26 n. 4; MÜLLER-ERZBACH, Wohin führt die Interessenjurisprudenz 96; and others.

<sup>214</sup> BALLANTINE, Corporations 249 § 70.

the comment expressly applies this rule to the case where "an agent of a corporation makes an agreement on behalf of the corporation which he was directed to make"; "the law of the state where the agreement is made determines whether the corporation is bound thereby. . . ." While the only added harmless example has no bearing on the question, the provisions of the Restatement seem to result in the rule that the authority of the board of directors, president, and other officers is governed by the law of the state where the contract with the third party is "made."

To understand the origin of this doctrine is easier than to approve of it. So long as the constitutional documents were the exclusively determinative expression of the authority of directors, fairly consonant interpretation of their provisions could be expected in all common law courts. With uniform substantive law, no conflicts rule is needed. The situation, however, has changed somewhat, even among the sister states of the Union, as a result of statutory modifications of the formerly uniform rule, as well as through variations in court practice. For example, the old rule that the president of a corporation has no privileged power except one conferred expressly by the charter or by-laws, has been substantially modified in many jurisdictions, but not in all, and the alterations are different enough to create an "Alabama rule," an "Arizona rule," an "Arkansas rule," and so forth. Should a Chicago court in the case of a New York corporation contracting in Illinois follow its own "Illinois rule"? While in interstate cases this difficulty may often be evaded by assuming the contract to have been made at the office of the officer representing the corporation, the problem presents itself unequivocally where a corporation of the German type enters into transactions by means of one of its directors at a place in the United States. Should the president of such a corporation be regarded as unauthorized, for the only



reason that a similar officer would be without authority under the Arkansas or Illinois rule? Of course, he should not. An American court would correctly argue that the general statutes giving the director absolute powers are to be read into the charter. But this means that the rules of the Restatement are sadly incomplete. The authority of a principal officer is determined by the law of the charter. Exceptions to the effect that authorization may also be derived from the law of the place where the officer acts, have to be carefully considered in connection with agency rules in general.

## CHAPTER 23

# Doing Business

### I. INTRODUCTION

#### 1. Regulation of Foreign Corporations

**W**HILE the state has no authority to impose a burden upon interstate commerce by taxation or otherwise, nevertheless it has authority to provide by legislation the terms and conditions upon which a foreign corporation may engage in intrastate business within its territorial limits, or avail itself of the benefits of its laws and the aid and protection of its courts in the enforcement of contracts relating to such business."<sup>1</sup>

This present American doctrine stands independently of its derivation from the antiquated doctrine of "comity," whereby a state may arbitrarily admit or "exclude" the corporations of sister states, although this connection is still all too vividly in the mind of many legislators and courts. In principle, every state may impose conditions on the exercise of activities in the state.<sup>2</sup> States are expected to hold these conditions within reasonable limits but are not constitutionally bound to do so in the case of intrastate commerce.

In this form, the principle is of universal significance.<sup>3</sup> However, the laws of the world display a variety of policies ranging from the utmost liberalism to prohibitive exactions. On the other hand, there is a common idea, more or less instinctively felt, that the territorial state is entitled to subject foreign organizations to visitation and regulation

<sup>1</sup> *Phillips Co. v. Everett* (1919) 262 Fed. 341 at 343, citing *Baltic Mining Co. v. Massachusetts* (1913) 231 U. S. 68, often quoted in cases.

<sup>2</sup> See *FLETCHER*, 17 Cyc. Corp. § 8302.

<sup>3</sup> *Cf. NEUMEYER*, 2 Int. Verwaltungs R. (1922) 139.

only when the latter have a definite contact with the territory, and that the state's interference may increase proportionately to the degree in which the foreign undertaking merges in the life of the population.

Usually, the minimum contact required for controlling a foreign corporation is either the fact of its reiterated "carrying on of business" in the country or its establishment of a "place of business" or of an agency, terms distinguishable as will be shown but overlapping to some extent. Thus, filing for a license "to do business" in the United States includes the indication of a principal place of business within the state.<sup>4</sup> Further, in Latin-American countries when trading within the national territory requires authorization,<sup>5</sup> usually a local representative must be appointed.<sup>6</sup> Agencies in most cases are probably supposed to be fixed at some place.

The case of a company having its principal establishment of manufacture or trade in the state, although it is incorporated and domiciled in another jurisdiction, is regarded in several systems mentioned earlier as requiring an outright exception to the principle of personal law.<sup>7</sup> Other cases in which intensified control, possibly reaching complete compulsory "domestication," is justifiable, are presented by the outstanding public interest involved in such purposes as banking, financing, insurance, communication, transportation, and other public utilities.

Normally, however, impositions on the business of foreign corporations should never go all the way to veritable "domestication" or reincorporation.

<sup>4</sup> Restatement § 169 comment c No. 3, and illustrations to § 167 Nos. 4 and 11.

<sup>5</sup> E.g., Bolivia: Decree of March 25, 1887, art. 5.

<sup>6</sup> E.g., Bolivia: Law of Nov. 13, 1886, art. 4; Decree of March 25, 1887, art. 2.

Guatemala: C. C. (1933) art. 25, *cf.* 23 in the case of "habitual business."

<sup>7</sup> Italy, Colombia, Nicaragua, Japan and others, see *supra* pp. 46-48.

## 2. Concept of Doing Business

The concept of carrying on business, as contrasted with isolated acts, is discussed in the United States in regard to three distinctive purposes: qualifying for license statutes—which alone is in question here—jurisdiction, and taxation.<sup>8</sup> Definitions are at some variance but agree in the essential point that a series of acts within the constitutional framework of the corporation must be performed or at least initiated.<sup>9</sup> In the definition by the Uniform Foreign Corporations Act (§ 2, I), sanctioned by the American Bar Association in 1934 but not yet adopted in any state,

“... the term ‘doing business’ means the transaction by a foreign corporation of some part of its business substantial and continuous in character and not merely casual or occasional.”

“Doing business” may or may not be regulated in the statutes of this country with the inclusion of charitable corporations.

The English definition for the purposes of jurisdiction, is simpler. In the words of Lord Herschell, “there is a broad distinction between trading *with* a country and carrying on a trade *within* a country.”<sup>10</sup> An English lawyer has observed that statutes in the United States do not so limit their field, “because the courts of the various states have employed every pretext to assume jurisdiction over foreign corpo-

<sup>8</sup> See Restatement, New York Annotations § 167 and CHEATHAM, Cases 1113, urging with ISAACS, 25 Col. L. Rev. (1925) 1024, that the courts should watch better than they usually did the different significances of the phrase “doing business.”

<sup>9</sup> This seems to be also the gist of the definition in comment a to Restatement § 167: “Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts.”

<sup>10</sup> Grainger v. Gough [1896] A. C. 325 at 335; La Bourgogne [1899] P. 1; [1899] A. C. 431; cf. Saccharin Corp. v. Chemische Fabrik etc. Akt. [1911] 2 K. B. 516.

rations.”<sup>11</sup> However this may be as to jurisdiction, American policy in regulating foreign corporate business is in fact less broad-minded than the English, although much more so than that of most other nations.

More closely approaching the English than the American concepts are the expressions “carrying on business” or a “trade” in Germany (*Geschäftsbetrieb*, *Gewerbebetrieb*), “direct exploitation of the object of the charter” in France, and “functioning” in Brazil, “trading (*girar*)” in Bolivia, et cetera, terms likewise conceived for the purpose of required governmental authorization. Business carried on with the country in the absence of any establishment within it, in theory, does not require a license in these countries.

### 3. Categories of Business Places

In Great Britain, registration is obligatory for foreign companies having “established a place of business” in the kingdom. This is a comprehensive term,<sup>12</sup> but it requires the company to have some “local habitation of its own.” The term “*succursale*” of French and many other laws, although often used in the narrower meaning of “branch,” is prevailingly understood to include all places of business where transactions occur, even though the business may be directed in all respects by the principal establishment. A careful Belgian definition declares a “*succursale*” to be “any dependent establishment (office, bureau, agency, etc.), any accessory center of commercial life, set up in a stable and regular course at a fixed place, where a manager resides and permanently represents

<sup>11</sup> FARNSWORTH, 20 Journ. Comp. Leg. (1938) 183.

<sup>12</sup> British Companies Act, 1929 (19 & 20 Geo. 5, c. 23) 500, Part XI, s. 344; the above mentioned definition was given tentatively by the Lord President in the Scotch case, Lord Advocate v. Huron and Erie Loan & Savings Co. (Feb. 28, 1911) (1911) S. C. 612, 616; accord Cohen, J., in *Tovarishestvo Manufactur Liudvig-Rabenek* [1944] 1 Ch. 404, 408.

the firm or legal person with authority to engage its liability in contracts."<sup>13</sup>

Another much narrower significance of "branch" (*Zweigniederlassung*) obtains in German, Austrian, and Swiss administrative rules. There, a branch office presupposes a permanent establishment with separate organization and assets accountable, having the power to conclude transactions independently, although subject to instructions by the central management.<sup>14</sup> Sometimes it is required that the business carried on be of the same kind as that of the head establishment, but on a smaller scale.<sup>15</sup> Hence impositions on branch offices in these countries do not extend to "agencies" or "representatives."

Aware of this proper sense of branch, the broad French scope of *succursale* is reached in Spanish, Portuguese, and Latin-American provisions by accumulating terms such as "branches, agencies, and representatives of foreign corporations." The meaning is explained by the Colombian laws that speak of "enterprise of a permanent character,"<sup>16</sup> and the new Italian text, "secondary seat with permanent agency."<sup>17</sup> In fact, in Latin America, any permanent establishment regularly needs registration, if not authorization.

"Agents" in the language of commercial relations, as distinguished from "representatives," have been described as persons securing business and referring offers to the constituent company, and this meaning has been attributed to

<sup>13</sup> App. Bruxelles (June 6, 1929) *Revue pratique des sociétés* 1929, No. 2972, cited in *Novelles Belges*, 3 D. Com. No. 5261; Trib. com. Bruxelles (Feb. 1, 1938) *Jur. Com. Brux.* 1938, 61.

<sup>14</sup> Germany: 14 ROHGE. 401, 17 *id.* 313; 38 RGZ. 263, 50 *id.* 429.

Austria: OGH. in Adl. Clem. 1800, *id.* 2804.

Switzerland: 56 BGE. I 364; 61 BGE. I 303.

<sup>15</sup> Switzerland: BG. (Dec. 10, 1924) 50 BGE. II 507, 510, *cf.* WIELAND, 43 Z. Schweiz. R. (N. F.) 242.

<sup>16</sup> Colombia: Legislative Decree No. 2 of 1906, art. 1; Law No. 58 of 1931, art. 22; Executive Decree No. 65 of 1941, art. 1.

<sup>17</sup> Italy: C. C. (1942) art. 2506.

"agents" as used in the Latin-American laws.<sup>18</sup> The various legislations may be divided on this point. However, the multifarious duties connected with permanent establishments, seem to have no bearing on independent brokers or distributors, intermediaries between an enterprise and its customers. Nor do they apply to merchants dealing with a foreign corporation on their own account and possibly working for several principals. Thus, these rules refer exclusively to physical or juristic persons that enter into transactions, or at least negotiate, on behalf of foreign corporations. This, at least, is their natural construction and should be presumed, if the contrary is not clearly intended.<sup>19</sup>

Similarly, the personal law of the foreign corporation has no application to subsidiaries or affiliates (French *filiales*, German *Tochtergesellschaften*) i.e., autonomous corporations or partnerships of any form, created under the territorial law, though economically dependent and often politically assimilated, to foreign, particularly enemy, organizations.

It follows incidentally that among the four main methods open to business management for operating in a foreign country, two do not enter into discussion in the following survey, namely, carrying on foreign activities by an independent distributor and by a juridically independent foreign subsidiary. We have to deal only with the two other procedures of submitting the entire corporation abroad to registration and other duties, or of having this done by a domestic-created subsidiary, organized for the purpose of business in the country.<sup>20</sup> Big American corporations most frequently use the latter method.

<sup>18</sup> See Régimen Jurídico 32, 98.

<sup>19</sup> Cf. NEUMEYER, 2 Int. Verwaltungs R. 143, 139 n. 5.

<sup>20</sup> For all four ways and their advantages and disadvantages, see the excellent symposium, "Legal Problems Affecting American Corporations Doing Business Abroad" (i.e., in Latin America) in 8 Tul. L. Rev. (1934) 550.

## II. SURVEY OF SYSTEMS

## I. Unconditional Admittance

Few countries accord freedom of trade to foreign-created legal persons without authorization either for recognition or for permitting the doing of business. England, however, has upheld its old liberal principle,<sup>21</sup> as have also Switzerland<sup>22</sup> and the Netherlands,<sup>23</sup> joined in 1873 by Belgium.<sup>24</sup> Also Yugoslavia<sup>25</sup> and, in this hemisphere, Argentina, Paraguay,<sup>26</sup> the Dominican Republic,<sup>27</sup> El Salvador,<sup>28</sup> and Venezuela<sup>29</sup> have based their rules on this system, although the first two countries require reciprocity of treatment. Hence, the Swiss and Argentine governments have been able to

<sup>21</sup> England: Companies Act, 1929 (19 & 20 Geo. 5., c. 23) 500, Part XI, s. 343, "Companies incorporated outside of Great Britain carrying on business within Great Britain."

<sup>22</sup> Switzerland: No impositions have been provided either by the Federation, BG. (July 22, 1887) Clunet 1893, 240, or by the Cantons, see WIELAND, 43 Z. Schweiz. R. (N. F.) 225; SAUSER-HALL, 50 Bull. Soc. Legisl. Comp. (1921) 228 at 237; BG. (July 12, 1934) 60 BGE. I 225.

Hungary: Classified similarly by DE MAGYARY, Clunet 1924, 596.

<sup>23</sup> The Netherlands: MOLENGRAAFF, "De la condition des sociétés étrangères dans les pays bas," in Clunet 1888, 619 at 623 (regretting this liberal attitude); KOSTERS 686-688.

<sup>24</sup> Belgium: Consolidated Companies Act, of May 18, 1873, arts. 128-130; text of 1935, arts. 196-199.

<sup>25</sup> Yugoslavia: C. Com. § 503 par. 1; EISNER, 1 Symmikta Streit 293.

<sup>26</sup> Argentina and Paraguay: C. Com. art. 287, as modified and interpreted in Argentina by Argentinian Law No. 8867, of Feb. 6, 1912, art. 1, also applied to a (Czechoslovakian) limited liability partnership, Cám. Com. de la Cap. (Feb. 12, 1926) 19 Jur. Arg. 78. Provisions concerning the required documentation are contained in the Decree of April 27, 1923, creating the "Inspección General de Justicia," art. 7. That no other conditions than these exist, has been stated by Cám. Com. de la Cap. en pleno (Sept. 18, 1940) 22 La Ley 537; C. Com. art. 287 is modified thereby, see Cám Com. de la Cap. 2a (May 5, 1939) 14 La Ley 708. Hence, Argentina is not really devoted to the theory of authorization, not to speak of the compulsion to nationalization. On the liberal background see ZEBALLOS, Clunet 1906, 604, 611.

<sup>27</sup> Dominican Republic: Sup. Corte de Justicia (Nov. 14, 1936) 316 B. J. (1936) 600.

<sup>28</sup> El Salvador: C. Com. art. 299.

<sup>29</sup> Venezuela: C. Com. (1919) art. 359 (new 334), 361 (new 336), nationalization being only optional; art. 361, "pueden adquirir la nacionalidad venezolana."



declare, without concluding a treaty, that stock companies of one country after due registration can reciprocally carry on business by agents in the other country.<sup>30</sup> But, registration and publication are additional requisites, and in such countries as Yugoslavia and Venezuela, formalities may impose grave restrictions on the freedom granted in principle.

## 2. Business Without a Permanent Place

Italy, Portugal, and Rumania, as well as modern Turkey, apparently allow not merely isolated acts, but all transactions short of establishing an agency in the country to be concluded by a foreign company.<sup>31</sup>

## 3. Business Under Domestic Law

The Spanish Commercial Code of 1885 unconditionally permits all business carried on either from outside or within the country, but, if permanent centers, agencies, or branches are established, all transactions made in the country are subject to the provisions of the Code. This system was initially followed in Colombia, Honduras, Mexico, Nicaragua, and Peru.<sup>32</sup> It is, in reality, an inadequate way of meeting the problem, revealing its dangerous elements when, nevertheless, requirements for doing business have been

<sup>30</sup> BURCKHARD, 3 Bundesrecht 1023, V.

<sup>31</sup> Italy: C. Com. (1882) art. 230; C. C. (1942) art. 2506; *cf.* CAVAGLIERI, *Dir. Int. Com.* 275.

Portugal: C. Com. arts 109, *cf.* 111.

Rumania: C. Com. (1938) arts. 356, 357.

Turkey: Law of Nov. 30, 1330/1914, art. 12, see SALEM, 7 *Répert.* 250 No. 135.

<sup>32</sup> Spain: C. Com. (1885) art. 15; *cf.* 21.

Colombia: C. Com. art. 19.

Cuba: C. Com. art. 15; Constitution (1940) arts. 19, 272.

Honduras: C. Com. (1940) arts. 10, 286.

Mexico: Formerly C. Com. art. 15; now Ley General de Sociedades Mercantiles, of July 28, 1934, art. 250; but see for the obstruction to this article by the courts, *supra* p. 145 n. 101, the literature cited.

Nicaragua: C. Com. arts. 8 and 10.

Peru: C. Com. art. 15; Constitution (1933) art. 17.

added,<sup>33</sup> or, on the other hand, the sweeping subjection to domestic law has been extended still further.<sup>34</sup>

#### 4. Qualifying for Authorization

The continuously alleged power of the states of the United States to "exclude" nondomestic corporations from business is deemed to be restricted by certain provisions in the Federal Constitution: the Commerce Clause, the doctrine of unconstitutional conditions, the Equal Protection and the Due Process Clauses,<sup>35</sup> and also the Full Faith and Credit Clause.<sup>36</sup> If a regulation does not violate the Constitution, its wisdom and equity cannot be challenged.<sup>37</sup> But statutes do not really exclude even alien corporations from business; they only require "licensing," dependent on objective and generally qualifying conditions.<sup>38</sup>

A main characteristic of this system, too obvious even to be noticed by American lawyers but a striking phenomenon for Europeans,<sup>39</sup> lies in the fact that the state statutes specify the conditions for licensing closely enough to make supervision by the courts possible and decisive. That half of the state statutes speak in imperative terms ("shall grant") while the other provisions are permissive, practically makes no difference. When the conditions provided by law are satisfied, authorization is automatically granted.<sup>40</sup> Whether also non-

<sup>33</sup> To illustrate, Colombia: Law No. 58 of 1931, art. 22 speaks of request for "permit" by the newly created Superintendencia de Sociedades Anónimas, and Decree No. 1984 of 1939, art. 4 emphasizes this request for a permit (called "special" in art. 3).

Mexico: C. C. arts. 2736-2738 and Ley General de Sociedades Mercantiles, art. 251 contain only prescriptions of formalities, but the restrictions on foreign corporations carrying on business have been considerably increased.

<sup>34</sup> Peru: *Infra* n. 130.

<sup>35</sup> Restatement §§ 169-178; FLETCHER, 17 Cyc. Corp. VI B, 227, §§ 8386 ff.

<sup>36</sup> HOLT, 89 U. of Pa. L. Rev. (1941) 452.

<sup>37</sup> State *ex rel.* Tri-State Telephone and Telegraph Co. v. Holm (1924) 160 Minn. 378, 200 N. W. 296.

<sup>38</sup> HOLT, *id.* 478.

<sup>39</sup> See LEPAULLE, Condition des sociétés étrangères (1923) 174ff., 233ff.

<sup>40</sup> Answer to a questionnaire, sent out by Mr. Lepaulle, see *id.* 179.

profit-seeking corporations need authorization is not well settled in all states; many states seem to "exempt such corporations from regulation altogether or else provide for some special method of regulation."<sup>41</sup> An express exemption from the duty of registration is provided in some provinces of Canada.<sup>42</sup>

Licensing is not believed to raise difficulties in any state, with the only exception that Illinois and New York require that the name be not susceptible of confusion with those of domestic corporations, these amounting in New York to some 50,000. This is a problem for companies of other states with an established firm name.

In most Latin-American countries, governmental authorization is required for establishing an "agency" or "representation." Only occasionally, as in Colombia and Nicaragua, the text of the statutes makes it clear that the permit for establishing a permanent place of business is certain to be granted on the filing of a request and fulfillment of the legal conditions.<sup>43</sup> But the writer is enabled by a statement of Dr. Phanor Eder, based on his experience, to note that in at least half of the Latin-American republics governmental authorization is always granted, if the constitutional documents of the corporation do not contain stipulations contrary to the basic principles of the domestic law.

<sup>41</sup> Policy in this respect is presumed by the draftsmen of the Uniform Foreign Corporations Act, National Conference, Handbook 1934, 306.

For duty to comply, *State ex rel. Griffith v. Knights of the Ku Klux Klan* (1925) 117 Kan. 564, 232 Pac. 254; *Knights of Ku Klux Klan v. Commonwealth* (1924) 138 Va. 500, 122 S. E. 122; *General Conference v. Berkey* (1909) 156 Cal. 466, 105 Pac. 411. *Contra*: *Eaton v. Woman's Home Missionary Society* (1914) 264 Ill. 88, 105 N. E. 746. See Note, 37 A. L. R. 1283.

<sup>42</sup> Ontario: Extra Provincial Corporations Act, Rev. Stat. 1937, c. 252 s. 2, class 6.

Saskatchewan: Companies Act, Rev. Stat. 1940, c. 113 s. 189.

Discretionary exemption in Alberta: Companies Act, Rev. Stat. 1942, c. 240 s. 134 (3).

British Columbia: Companies Act, 1929, c. 42 s. 179 (5).

<sup>43</sup> Colombia: Acto Legislativo Constitucional No. 1 of 1936, art. 6; C. Com. art. 19 read with Law No. 58 of 1931, art. 22 and Executive Decree No. 65 of 1941.

Nicaragua: C. Com. (1916) art. 10.

The text of the Hungarian Commercial Code follows the same principle.<sup>44</sup>

### 5. Discretionary Grant of Authorization

The liberality of the licensing system in this country is perceived when contrasted with other legislations.

In various German states, foreign industrial and commercial enterprises have always required trade authorization by the state authorities supervising industry and trade, except where treaties accord reciprocity.<sup>45</sup> These disadvantages were inspired by suspicions of foreign law more than foreign capital. The recent German Corporation Law of 1937 superimposes the necessity of governmental approbation,<sup>46</sup> which may be refused without giving reasons, and may be freely revoked.<sup>47</sup> This is a trend backward to the system prevailing in Austria and some Eastern European legislations, which have simply provided that every foreign business corporation shall be subject to discretionary permission for doing business.<sup>48</sup>

Most statutes of the Latin-American countries requiring governmental authorization for the establishment of a permanent business place are drafted in terms that possibly reserve to the governments full power of granting or refusing. What

<sup>44</sup> Hungary: C. Com. arts. 210-217.

<sup>45</sup> Reichsgewerbeordnung § 12 in combination with Prussian Law of June 29, 1914 (carrying on a nonambulatory business).

Bavaria: Law of February 6, 1868, art. 2 (carrying on business).

Saxony: Ordinance of Nov. 10, 1899, § 5.

Württemberg: Executory Law to the BGB., art. 282. Cf. NEUMEYER, 2 Int. Verwaltungs R. 142ff.

<sup>46</sup> Aktiengesetz (1937) § 292 (stock companies); Einführungsgesetz to this law, § 27 (limited partnerships, profit associations and co-operatives). On the state agencies on which the authorization depends, see BEITZKE, Clunet 1937, 1002.

<sup>47</sup> BEITZKE, Jur. Personen 166.

<sup>48</sup> Austria: Imperial Order of Nov. 29, 1863, and Law of March 29, 1873, still valid in Czechoslovakia.

Poland: Law of March 22, 1928, No. 383, on stock companies, art. 4 par. 6; Order of Dec. 20, 1928, No. 919; on a more recent similar provision regarding limited private companies, see 12 Z.ausl.PR. (1939) 867.

Rumania: C. Com. of 1887, arts. 238, 244; C. Com. of Nov. 10, 1938, branches and agencies may not be established unless reciprocity is guaranteed

is the "public policy" to which corporate contracts and documents ought not to be contrary in Mexico?<sup>49</sup> Precise terms have been used for this purpose in the older Brazilian prescription that foreign stock corporations and nonprofit associations should file their charters and by-laws for "approbation," in order to enable them to function in Brazil (*funcionar no Brasil*).<sup>50</sup> The actual provisions are that all organizations pursuing purposes of collective interest, as companies and foundations, follow the laws of the state where they have been established but may not have branches, agencies, or establishments before their constitutive acts have been approved by the Brazilian Government.<sup>51</sup> In a decree of 1891, it was prescribed that the government shall ascertain "whether the company has a proper purpose and whether it is to the advantage of the public; whether its creation is opportune and its success probable; . . . whether the capital is adequate for the company purposes; . . . whether the provisions relating to administration, accounting, dividends, reserve funds, operations, and obligations, protect the interests of the shareholders and of the public."<sup>52</sup> A recent regulation more briefly provides that the Federal Government, in authorizing a stock corporation may establish "the conditions that it shall deem convenient for the protection of the national interests."<sup>53</sup> It is controversial whether partnerships lacking corporative articles of association, as they are based only on a contract, are free from this burden.<sup>54</sup> In Chile, the President of the Republic examines whether

(art. 355); in the case of joint stock companies and limited partnerships only after authorization by the government (art. 356).

<sup>49</sup> Mexico: Ley General de Sociedades Mercantiles (1934) art. 251, fr. II.

<sup>50</sup> Brazil: C. C. art. 20 § 1, as amended by Decree No. 3725, of Jan. 15, 1919; Decree No. 434, of July 4, 1891, art. 47.

<sup>51</sup> Brazil: Introductory Law (1942) art. 11 § 1; Decree-Law No. 2627 (sobre as sociedades por ações) of Sept. 26, 1940, art. 64.

<sup>52</sup> Brazil: Decree No. 434, of July 4, 1891, art. 52.

<sup>53</sup> Decree-Law No. 2627, of Sept. 26, 1940, art. 65 § 1.

<sup>54</sup> BEVILAQUA, 6 Répert. 162-164; on the full controversy see ESPINOLA, 6 Tratado 547.

the interests of the stockholders and of third persons are protected,<sup>55</sup> and a granted authorization may be revoked if the President "for any reason" estimates that a stock company does not offer the guarantees required for authorization.<sup>56</sup>

## 6. Domestication

Domestication is a procedure whereby a corporation loses its foreign character and becomes a domestic corporation.

Although none of the above-described methods should be characterized as requiring the conversion of a foreign corporation into a domestic one, certain additional requirements, which are to be mentioned below, may greatly contribute to efface the distinction between authorization and domestication. Is it true, however, that some, if not most, of the Latin-American states demand a veritable "nationalization" as a condition precedent to permitting the carrying on of business? There is a theory to this effect advocated by a few Latin-American authors<sup>57</sup> and apparently supported by the language of some statutes. Thus, Bolivia prescribes that the company should solicit "its legal constitution"<sup>58</sup> at the Ministry of Industry; Brazil that it should submit its own constitutional document for "approbation";<sup>59</sup> and the Mexican Supreme Court insists on the idea that inscription in the register is indispensable for giving a foreign company "life in Mexico," such existence including the right to sue;<sup>60</sup> so

<sup>55</sup> Chile: C. Com. art. 468; Decree No. 1521, of May 3, 1938, arts. 47-49; Decree-Law No. 251, of May 22, 1931, arts. 120ff.; *cf.* on the requirements, HERRERA REYES, *Sociedades anónimas* (Santiago 1935) 272 § 300.

<sup>56</sup> Chile: Decree-Law No. 251, of May 22, 1931, art. 126, while the former Regulation No. 3030, of December 22, 1920, art. 48 required an "important" reason.

<sup>57</sup> Most outspoken, GIL BORGES, *Informe 1*, reproduced also by the Peruvian motion to the Eighth Pan-American Conference, *Diario* 616.

<sup>58</sup> Bolivia: Decree of March 25, 1887, art. 5.

<sup>59</sup> Brazil: C. C. art. 20.

<sup>60</sup> See cases of Amparo Zardaín and Amparo Palmolive, as discussed by SCHUSTER, "The Judicial Status of Non-Registered Foreign Corporations in Latin America-Mexico," 7 *Tul. L. Rev.* (1933) 341 at 356ff., ns. 80, 83, 86; 8 *id.* 563 and *supra* Chapter 22 p. 145 n. 101.

also the Civil Code of Peru requires foreign juristic persons to register "in order to enjoy personality."<sup>61</sup> Although these expressions have an unfortunate connection with the problems both of standing in court by foreign corporations and of their subjection to domestic laws,<sup>62</sup> reasonably they cannot mean the production of a new juristic personality by compliance with statutes prescribing authorization of doing business or registration.<sup>63</sup>

The opposite theory would involve the queer proposition<sup>64</sup> that a foreign corporation is recognized as a person so long as it has not established an agency in the country but loses its existence by establishing an agency, whether without authorization, or even after obtaining an authorization, since that would be granting a new personality. It would, then, seem more consistent to abandon formally the idea of recognition *ipso jure* and all the hopes that it once embodied.

Domestication, as facultative and optional rather than the exclusive way to obtain permission for doing business, is much less harmful and may sometimes be a perfectly convenient method. American concerns have been advised to create subsidiaries in this country, specially designed for reincorporation in determined foreign countries.<sup>65</sup>

Within the United States domestication is almost obsolete and seems to exist only in Georgia.<sup>66</sup>

<sup>61</sup> Peru: C. C. (1936) art. 1058. Similarly, Bolivia: Law of Nov. 13, 1886, art. 4. To the same effect, as it seems, Panama: C. Com. arts. 296, 378; *cf.* EDER, 15 Tul. L. Rev. (1941) 528, 532.

<sup>62</sup> See *supra* p. 145; *infra* pp. 216-217 and 199-201.

<sup>63</sup> See 2 RESTREPO-HERNANDEZ 92 § 1191: "La incorporación no produce una nueva persona jurídica."

<sup>64</sup> There was an older Italian opinion of this kind, developed by FIORE, and refuted by DIENA, 1 Dir. Com. Int. 245; CAVAGLIERI, Dir. Int. Com. 261, 262.

<sup>65</sup> See the instructive information by CRAWFORD, 11 Tul. L. Rev. (1936) 59.

<sup>66</sup> Georgia: Code (1936) § 22-1601; *cf.* C. C. H., State Tax Guide Service 1214 § 20.021. On the quite different domestication for the purpose of taxation, see WUNSCHER, "Taxation-Business Situs of Credits-Domestication of Foreign Corporations," 41 W. Va. L. Q. (1935) 412.

## 7. Reciprocity

Reciprocity as a condition for license appears in a few European countries,<sup>67</sup> and underlies the "retaliatory" statutes in the United States putting foreign corporations—especially insurance companies—under the same restrictions and burdens as are imposed by the state of incorporation upon corporations of the enacting state, thus discriminating in favor of domestic corporations.<sup>68</sup> Such provisions, recognized as constitutional,<sup>69</sup> are more frequently applied to taxation but have also been used to deny the benefit of the rule that the corporation may maintain a suit after belated licensing.<sup>70</sup>

## III. THE POSITION OF PERMANENT ESTABLISHMENTS IN CONFLICTS LAW

### 1. Principle

It is a general doctrine that branch offices, whether in the narrower or broader meaning of the word, have a double nature influencing their treatment in conflicts law.

On the one hand, an establishment forms an organic part of the entire enterprise and, therefore, participates in the personal law of the main organization. To the extent that nationality is ascribed to the legal body, the branch office shares in this.<sup>71</sup>

<sup>67</sup> Austria: Allg. BGB. § 33 (formal, not material, reciprocity, requiring that Austrians be treated like the citizens, not like the foreigners in Austria); Law on Limited Partnerships (Ges.m.b. H. Gesetz) § 108.

Bulgaria: C. Com. art. 227 No. 7.

Denmark: Stock Corporation Law, of Sept. 29, 1917, § 42; Companies Law No. 123, of April 15, 1930, § 74.

France: Regulation concerning Insurance Companies, of Dec. 30, 1938, art. 143 par. 1 (according to NIBOYET, 3 *Traité* 237 n. 1).

Poland: Decree of Feb. 7, 1919, art. 7.

Rumania: C. Com. (1938) art. 355.

<sup>68</sup> See FLETCHER, 17 *Cyc. Corp.* 456 § 8461 n. 35.

<sup>69</sup> FLETCHER, 17 *Cyc. Corp.* 270 § 8399.

<sup>70</sup> Wolf v. Lancaster (1903) 70 N. J. Law 201, 56 *Atl.* 172; treated as a general rule by 2 BEALE 856 n. 3.

<sup>71</sup> Germany: RG. (May 2, 1924) 108 *RGZ.* 265.

Hungary: S. Ct. (April 30, 1930) *Clunet* 1931, 1243.



On the other hand, a branch joins in the life of the country where it is established and, for this reason, to a large extent must obey the territorial law.<sup>72</sup> For the purpose of this law, it is often considered "domiciled" in the country of its location.<sup>73</sup> Transactions between the corporation and its branch are of significance at least in tax and administrative law.<sup>74</sup>

## 2. Scope of the Personal Law

The personal law will regularly govern the internal organization of a branch office, as for instance the distribution of powers and the administrative relations between the central and the branch offices.<sup>75</sup>

It determines traditionally the name or "firm" of the branch, although convenient additions to the name may be locally prescribed to show the kind of association or the fact that the central management is foreign and where it is situated.<sup>76</sup> Laws are divided on the question whether the foreign-acquired name is to be protected when it is apt to create confusion with a local corporation established before the branch but after the foreign corporate name was made known abroad.<sup>77</sup> In a few jurisdictions, however, these rules

<sup>72</sup> Belgium-France, Convention concerning Conditions of Residence (Oct. 6, 1927) art. 7, 69 L. of N. Treaty Series (1927) 49 at 53, 127 British and Foreign State Papers (1927) Part II 98 at 99.

<sup>73</sup> See, for instance, Brazil, C. C. art. 35 pars. 3 and 4, as construed by ESPINOLA, 8-C Tratado 1406, 1781.

Nicaragua: C. C. art. 34 par. 2.

Venezuela: C. Com. arts. 359 (new 334), 360 (new 335).

<sup>74</sup> Recognized in Cuba, Trib. Supr., decisions cited in 3 Jurisprudencia del Trib. Supr. (1944) No. 2165.

<sup>75</sup> WIELAND, 43 Z. Schweiz. R. (N. F.) 271; Swiss Fed. Trib. (April 1, 1924) 50 BGE. II 51, 57 (with a point against French war measures) see *supra* Chapter 19, p. 61 n. 111.

<sup>76</sup> Switzerland: Rev. C. Obl., art. 952, last par.; Law of Dec. 18, 1936, Eidgenössische Gesetzsammlung 1937, No. 13.

Germany: HGB. § 20; Ges.m. b. H. Gesetz § 4; Genossenschaftsgesetz § 3 par. 1; Aktiengesetz § 4.

Liechtenstein: P. G. R. § 1044 par. 1.

Poland: Stock Companies Order, of December 20, 1928, § 6.

<sup>77</sup> Cf. German HGB. § 18 par. 2; 42 Jahrb. KG. 160; Liechtenstein: P. G. R. § 1044 par. 3.

are set aside, the territorial rules claiming completely to determine the branch name.<sup>78</sup>

The personal law determines also the liability of the main organization for obligations entered into by the branch,<sup>79</sup> as well as the termination of the branch through dissolution of the main body.<sup>80</sup>

That organization and internal government of the main enterprise in deciding such incidents as the issue and purchase by a corporation of shares of stock, modification of capital, negotiability of share certificates issued out of the state, are beyond the territorial legal domain, may be considered as generally admitted.<sup>81</sup>

Consistent Continental opinion holds in all these respects the same principle to be applicable to branches of unincorporated organizations.<sup>82</sup> The importance of the individual members for the structure of a partnership is appreciated. Nevertheless the corporate attributes of a copartnership also exercise their influence.

### 3. Territorial Law Governing According to General Conflicts Rules

Natural circumstances justify conflicts rules referring to the territorial laws in the following respects:

(a) In every case of a branch office or other permanent representation of any foreign principal, it is universally agreed that the authority enjoyed by the directors or agents, in contracting with third persons in the country of the establish-

<sup>78</sup> Laws of Sweden, Denmark, and Norway on registration, § 16, criticized by NEUMEYER, 2 Int. Verwaltungs R. 189, 193, but recommended by WIELAND, 43 Z. Schweiz. R. (N. F.) 218, 237, cf. 244.

<sup>79</sup> PILLET, *Personnes Morales* § 167.

<sup>80</sup> See *supra* Chapter 20, p. 90.

<sup>81</sup> Yet, BALLANTINE, *Corporations* § 293 and the same, *Cal. Corp. Law* 312 § 323, defines the scope of the territorial law in a broader way.

<sup>82</sup> See, for instance, Yugoslavia, C. Com. (1937) §§ 104, 165, 504, 507; and in general the citations *supra* pp. 100ff.

ment, should be determined by the law of the place where the authority is acted upon rather than where it has been granted. A slight difference exists in that in the United States the decisive place is regarded to be that of contracting<sup>83</sup>—whatever this may mean practically—while in other countries it is assumed to be the place of the establishment itself.<sup>84</sup>

(b) It is likewise consonant with general considerations of conflicts law that the manager of a branch office should be personally liable to third persons either by collateral or subsidiary liability whenever the law of the country so provides.

(c) As a matter of course foreign organizations are subject to the general local administrative provisions concerning bookkeeping and accounting, publication of balance sheets, inspection and information,<sup>85</sup> labor, taxation, and bankruptcy.<sup>86</sup> This explains easily the often discussed rules that the issue of shares or bonds within the state by a foreign corporation is subject to the territorial provisions, and that stock exchange regulations include the quotation of foreign stocks.<sup>87</sup> In the United States, laws regulating the holding or transfer of shares<sup>88</sup> and even a local prohibition of partner-

<sup>83</sup> *American Fire Ins. Co. v. King Lumber Co.* (1917) 74 Fla. 130, 77 So. 168.

<sup>84</sup> Germany: RG. (Dec. 5, 1896) 38 RGZ. 194; (April 3, 1902) 51 RGZ. 147; (Jan. 14, 1910) 66 Seuff. Arch. No. 73; cf. HUPKA, *Die Vollmacht* (1900) 252.

Yugoslavia: C. Com. (1937) § 507.

<sup>85</sup> *Gettridge v. State Capital Co.* (1933) 129 Cal. App. 86, 18 Pac. (2d) 375; *Winter v. Baldwin* (1889) 89 Ala. 483, 7 So. 734.

Código Bustamante, art. 250.

Belgium: Consolidated Companies Act (1935) art. 198.

Denmark: Law of April 15, 1930, §§ 75ff.

Germany: KÖNIGE, Leipz. Z. 1914, 1417.

Italy: C. C. (1942) art. 2506.

Portugal: C. Com. art. 111.

<sup>86</sup> E.g., France: Cass. (req.) (June 19, 1908) Clunet 1909, 1094.

Yugoslavia: C. Com. § 508, see EISNER, 1 *Symmikta Streit* 296.

<sup>87</sup> 2 LYON-CAEN et RENAULT § 1141.

<sup>88</sup> See 2 BEALE 782 n. 3.

ship with other corporations<sup>89</sup> have been held applicable.

(d) Qualification as a merchant, for the purposes of local rules on registration, firm name, and accounting, is determined by the local law.<sup>90</sup> But when the "commercial" nature of contracts, executed at the main office, is examined for purposes of jurisdiction or other matters, the personal law should be applied.

#### IV. STATUTORY IMPOSITIONS

##### 1. Service of Process and Jurisdiction

Statutes regularly require foreign corporations and firms desiring to do business, to indicate a fixed place of business and an agent or a principal manager upon whom service of process may be made. This certainly is a fair provision insofar as litigation involves contracts, tort, taxation, or other duties connected with the business conducted by the agency. It is a corresponding good rule that the local courts should refrain from taking jurisdiction beyond the affairs of the establishment<sup>91</sup> "on a cause which arose wholly outside of the state."<sup>92</sup> But there is a tendency to extend further the authority of local agents to all matters inclusive of the causes of action arising abroad.

<sup>89</sup> 2 BEALE 782 n. 4.

<sup>90</sup> France: 2 LYON-CAEN et RENAULT § 1127.

Germany: 36 RGZ. 394; OLG. Kassel, Leipz. Z. 1909, 954; WIELAND, 1 Handelsr. 619 n. 18; STAUB-BONDI, in 1 Staub § 6 n. 3, § 33 n. 4; cf. § 22 n. 4 explaining that, if the personal law agrees, the local German HGB. §§ 22, 30 permits the transfer of a branch with its firm name to another person.

<sup>91</sup> See, e.g., Italy: SERENI, Rivista 1931, 266.

Colombia: Legislative Decree No. 2 of 1906, art. 2.

Costa Rica: Law No. 10, of Dec. 3, 1929, art. 1 (3) (amending Corporation Law, art. 151) "for the decision of the judicial questions to which the transactions of the branch give rise and in all matters concerning requisites of publicity, . . ."

Guatemala: C. C. (1933) art. 25 (2); Legislative Decree No. 1370, of April 16, 1925, art. 1.

Treaty of Montevideo on Commercial Law (1889) art. 6.

<sup>92</sup> Canada: Pearson (or Pearlman ?) v. Great West Life Assurance Co. (C. A. 1912) 2 W. W. R. 563, 4 D. L. R. 154.

In England, where no establishment of the foreign company exists but there is a representative, his authority to receive a writ of summons without limitation extends to all suits against the company, even though he may manage only a share transfer office,<sup>93</sup> but it has been said that his authority must be proved by the plaintiff, "which is difficult."<sup>94</sup>

The American statutes prescribing the appointment of an agent as a condition precedent to licensing, are divided. In a distinct group, the authority of the required agent is restricted to domestic matters either by an express clause<sup>95</sup> or by implication.<sup>96</sup> Of the remaining statutes uncertain in language, many more possibly may be claimed for this latter class.<sup>97</sup> In the great majority of licensing statutes, however, in case a foreign corporation has not appointed an agent or the agent has disappeared or lost his authority, an official

<sup>93</sup> The Madrid [1937] P. 40.

<sup>94</sup> GUTTERIDGE, "Le Conflit des lois de compétence judiciaire dans les actions personnelles," 44 Recueil (1933) II, 111 at 129; cf. DICEY 232.

<sup>95</sup> Kansas: Gen. Stat. (1935) § 17.501.

Nebraska: Rev. Stat. (1943) § 21-1201.

New Hampshire: Rev. Laws (1942) c. 280 § 1.

South Dakota: Code (1939) § 11.2003.

Washington: Rem. Rev. Stat. (1932) Supp. § 3836-18.

<sup>96</sup> Alabama: Code Ann. (1940) tit. 10 § 192; Jefferson Island Salt Co. v. Longyear Co. (1923) 210 Ala. 352, 98 So. 119.

Idaho: Code Ann. (1932) § 29-502.

Indiana: Burns' Stat. Ann. (1933) § 25-304; § 25-306, as amended by L. 1941, c. 226 § 8.

Iowa: Code (1946) § 494.2.

North Dakota: Rev. Code (1943) §§ 10-1710, 10-1733, 10-1734.

Rhode Island: Gen. Laws Ann., c. 116 § 65 as construed by cases.

South Carolina: Code (1942) § 7765.

Tennessee: Code Ann. (1943) § 4120.

Wisconsin: Stat. (1943) § 226.02.

<sup>97</sup> Arkansas: Pope's Dig. Stat. (1937) § 2247; American Ry. Express Co. v. Rouw Co. (1927) 173 Ark. 810, 294 S. W. 401.

Arizona: Code Ann. (1939) § 53-801.

Georgia: Code Ann. (1933) § 22-1101; Reeves v. Southern R. Co. (1905) 49 S. E. 674.

Maryland: Flack's Code Ann. (1939) art. 23 § 119 as amended by L. 1943, c. 932, and § 120 as amended by L. 1941, c. 687.

Minnesota: Stat. (1945) §§ 303.06, 303.13; Erving v. Chicago & Northwestern R. Co. (1927) 171 Minn. 87, 214 N. W. 12.

of the state—the secretary of state, the auditor, et cetera—is designated as attorney for the corporation with authority to receive service of process either under a declaration to be made by the corporation or by a statutory provision. The courts, under the guidance of the Supreme Court of the United States,<sup>98</sup> have developed a system varying in the states and apparently still fluid, which the draftsmen of the Uniform Foreign Corporations Act refrained from reproducing in a section, because it would be enormously complicated.<sup>99</sup> One of the particular doctrines is that service on an appointed agent or the official designated as attorney, may be effected in causes arising outside the state, where the corporation has appointed him to this effect, or is deemed to have consented to his authority, especially in the case of a public officer, by having filed for doing business on the ground of a statute unequivocally conferring on him constructive authority, while the corporation is actually doing business at the time suit is brought against it.<sup>100</sup>

In a few jurisdictions, the right to sue a foreign corporation doing business in the state for all causes of action is a privilege of residents. Moreover, a practice has developed that carrying on business in a state adds to the probability that the courts of the state will take jurisdiction in cases involving the in-

Mississippi: Code Ann. (1942) § 5345.

New York: Gen. Corp. Law, § 210; *Karius v. All States Freight, Inc.* (1941) 176 Misc. 155, 26 N. Y. Supp. (2d) 738.

Ohio: Gen. Code Ann. (1938) § 8625-5; *Burke v. McClintic-Marshall Construction Co.* (1910) 9 O. N. P. (N. S.) 577.

<sup>98</sup> *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co.* (1917) 243 U. S. 93; *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.* (1921) 257 U. S. 213; *Missouri Pacific R. Co. v. Clarendon Boat Oar Co. Inc.* (1922) 257 U. S. 533; *Davis v. Farmers Co-op. Equity Co.* (1923) 262 U. S. 312; *Mich. Central R. Co. v. Mix* (1929) 278 U. S. 492; *Canadian P. R. Co. v. Sullivan* (C. C. A. 1st 1942) 126 F. (2d) 433, *cert. denied* (1942) 316 U. S. 696.

<sup>99</sup> National Conference, Handbook 1934, 325; *cf.* Restatement §§ 90, 91.

<sup>100</sup> *Karius v. All States Freight, Inc.* (1941) 176 Misc. 155, 26 N. Y. Supp. (2d) 738; *Erving v. Chicago & Northwestern R. Co.* (1927) 171 Minn. 87, 214 N. W. 12. Note on service of process upon designated state official, 145 A. L. R. (1943) 630.

ternal affairs of the corporation where all parties to the controversy are in the state.<sup>101</sup>

In many other countries, as clearly laid down in the Japanese Code<sup>102</sup> and particularly in Latin America,<sup>103</sup> jurisdiction is taken on a broad scale against foreign corporations domiciled in any sense in the state. The parent corporation may thus be exposed to heavy commitments even at home when judgments of the territorial courts are accorded enforcement in the state of charter.<sup>104</sup> A wholesome reaction sometimes appears under French influence. For instance, an Argentine decision making a branch office in Buenos Aires of a Liverpool shipping line liable for faulty performance of an affreightment by the branch office of the same firm in New York, has been severely criticised on the basis of the French principle that a suit must refer to acts done or obligations created in the jurisdiction of the branch or agency, in order to avoid abusive actions against foreign firms.<sup>105</sup>

## 2. Registration

In the great majority of countries, though not in the

<sup>101</sup> See in particular Maryland, Flack's Code Ann. (1939) § 119, c and d; Missouri Rev. Stat. Ann (1939) § 6005 as to insurance corporations; for a Delaware corporation doing business in Missouri, State *ex rel.* Northwestern Mutual Fire Association v. Cook (1942) 349 Mo. 225, 160 S. W. (2d) 687, cf. Note, 145 A. L. R. (*supra* n. 100) at 652; 2 BEALE 891 § 192-7 and cases cited.

<sup>102</sup> Japan: C. Com. art. 255 par. 2, as construed by the Jap. S. Ct. (February 15, 1905), covers the whole of the company's business, and according to App. Tokyo (July 23, 1920) extends to matters arising abroad. See 1 C. Com. of Japan Ann. (1931) 405, 406.

<sup>103</sup> Brazil: Decree-Law No. 2627, of Sept. 26, 1940, art. 67: foreign stock corporations, licensed to do business, are required to have a permanent representative in Brazil, subject to be sued and to receive initial service for the corporation, with full powers to treat and to determine definitely, any matters. The meaning, however, may be restricted to acts and operations on behalf of the company in the country; art. 68 subjects only such operations to the laws of Brazil.

<sup>104</sup> See CRAWFORD, "The Brazilian Business Corporation," 11 Tul. L. Rev. (1936) at 63.

<sup>105</sup> Argentina: Cám. Fed. de la Cap. (March 17, 1941) Praizos Hnos. v. Lamport Holt Line, 75 Jur. Arg. 231, criticized by DE LA VEGA, *id.* 232.

United States and the Netherlands (which have not instituted any special index of foreign corporations),<sup>106</sup> business organizations are recorded in special public registers. Foreign enterprises have in most states to register any agency established in the territory. Germany and Switzerland traditionally require only branch offices in the narrow sense to be registered, a restriction that has been criticised in the interest of the security of commerce.<sup>107</sup> Since 1908, England, which has no general register of commerce, also has required foreign companies having any place of business in the country to register.<sup>108</sup> Canadian provinces have to some extent followed this method.<sup>109</sup>

While in England there is a special register for foreign companies, in other countries a problem is presented with respect to the registration of foreign associations, in view of the different registers and regulations for recording domestic associations, such as stock corporations, limited liability partnerships, and ordinary firms.

Generally, the provisions respecting domestic organizations are applied by analogy;<sup>110</sup> the formalities of those in situations most similar to the foreign association are employed.<sup>111</sup> If there is no parallel, the Italian Code prescribes compliance with the most exacting formalities, viz., those imposed on stock corporations.<sup>112</sup> In Germany, it is prescribed policy to require only documentation and facts that can be furnished

<sup>106</sup> This was criticized long ago by ASSER because of the absence of provisions making foreign corporations known, see KOSTERS 688 n. 5.

<sup>107</sup> WIELAND, 43 Z.Schweiz.R. 243ff.

<sup>108</sup> Companies Act, 1929 (19 & 20 Geo. 5, c. 23) 500, Part XI, s. 343.

<sup>109</sup> Alberta: Companies Act, Rev. Stat. 1942, c. 240, s. 134.

British Columbia: Companies Act, Rev. Stat. 1936, c. 42, s. 179.

Manitoba: Companies Act, Rev. Stat. 1940, c. 36, s. 453.

Saskatchewan: Companies Act, Rev. Stat. 1940, c. 113, s. 189.

<sup>110</sup> Japan: C. Com. art. 255 par. 1.

<sup>111</sup> Switzerland's Federal Council (June 16, 1902) discussed by STEIGER, 67 ZBJV. (1931) at 324.

<sup>112</sup> Italy: C. Com. (1882) art. 230 par. 3; C. C. (1942) art. 2507.

Similarly, Rumania: C. Com. (1938) art. 358.



on the basis of the foreign law;<sup>113</sup> to reconcile both laws, it has also been held that where the general law of the incorporating state limits the liability of directors in a manner unknown to the law of the forum, these limitations must be recorded to be available against a third party.<sup>114</sup>

Some legislations, however, have imposed special heavy burdens of documentation upon foreign corporations, and worse, registrars and courts sometimes exaggerate these requirements so as to render compliance extremely cumbersome.<sup>115</sup>

### 3. Publications

A number of statutes have prescribed the data to be given in registration and in subsequent notifications regarding the financial status of the association.<sup>116</sup> This is in line with the recent strong increase of supervisory policy, tending to enlarge the control of the management by the state and the public. But again, the impositions may go too far. Sometimes, an inappropriate curiosity is displayed in inquiring into business done outside of the state. This is another reason for big corporations with a worldwide radius of activity to form subsidiaries with capital funds set apart for the purposes of the branches.<sup>117</sup>

<sup>113</sup> German HGB. § 13 par. 3; see also § 201 par. 5; Aktiengesetz § 37. Cf. Denkschrift zum Entwurf eines HGB. (1888) 26; NEUMEYER, 2 Int. Verwaltungs R. 191 n. 5, 202.

<sup>114</sup> KG. (March 8, 1929) IPRspr. 1929 No. 21; RABEL, 3 Z.ausl.PR. 810.

<sup>115</sup> For example, complaint has been made by GRANT, 8 Tul. L. Rev. (1934) 557 against the requirements connected with the obligatory filing of a general power of attorney in Mexico and Cuba; by EDER, 15 Tul. L. Rev. (1941) 520 at 534 with respect to Panama.

An effort to remedy these difficulties has been initiated by a Pan-American "Protocol on Uniformity of Powers of Attorney Which are to be Utilized Abroad," Washington, February 17, 1940, signed by Bolivia, Brazil, Colombia, El Salvador, Nicaragua, Panama, United States and Venezuela, and ratified by the United States, Brazil and several other states. See 36 Am. J. Int. Law (1942) Supp. 193 and subsequent volumes. The Protocol includes powers executed in the name of a juridical person (art. I s. 3).

<sup>116</sup> See FICKER, 4 Rechtsvergl. Handwörterbuch 469.

<sup>117</sup> See CRAWFORD, "The Brazilian Business Corporation," 11 Tul. L. Rev.

#### 4. Guarantees

In some countries, the creditors of the branch are protected by such measures as deposits to secure future debts, or a certain part of the capital stock must be held in the country, in Brazil at least two-thirds.<sup>118</sup> Again, establishment of a legally independent affiliate is the usual answer.

#### 5. Application of the Internal Law

As stated above, foreign business associations are quite normally governed by the domestic administrative law with regard to establishments, and by the domestic law of agency as respects the extent of the authority enjoyed by the managers of the establishment. It agrees with the general principles that article 287 of the Argentine Commercial Code subjects the company to the provisions of the Code as regards the registration and publication of the articles of organization and of the authority conferred upon their representatives or agents.<sup>119</sup> On the other hand, the legitimate sphere of domestic law is also observed in the Treaty of Montevideo (art. 5), which limits the territorial prescriptions to "the exercise of the acts comprised in the objective of incorporation."

Only such restricted effect should be inferred when it is required that a resident representative of the company must possess a general power of attorney with full authority to bind the company by his acts.<sup>120</sup> By an analogous reasoning,

(1936) 59 at 63, and "The 1940 Corporation Law of Brazil," 16 Tul. L. Rev. (1942) 228 at 237.

<sup>118</sup> Brazil: Decree No. 434, of July 4, 1891, art. 47 § 1.

Rumania: C. Com. (1887) art. 245 is probably repealed; such measures have been abolished in other countries, except for insurance and similar companies.

<sup>119</sup> To similar effect, Brazil: Decree-Law No. 2627, of Sept. 26, 1940, art. 68 (but see n. 128).

Guatemala: C. C. (1933) art. 25 (4).

Portugal: C. Com. art. 111.

<sup>120</sup> Expressly, Denmark: Law on Stock Corporations, of April 15, 1930, § 77 ("in all legal relations arising out of its activity in the country").

if the Chilean law provides that not only must a foreign stock company establish a special fund in Chile for the fulfillment of its obligation in the country, but also that the assets of the company are "affected by the Chilean laws," the latter provision reasonably is limited to the assets situated in Chile.<sup>121</sup>

In the United States, the Supreme Court has twice had opportunity to deal with the attempt of Missouri to protect resident holders of insurance policies against certain subsequent contracts modifying their policies. The court summarized the arguments of the Missouri court as follows:

"As foreign insurance companies have no right to come into the State and there do business except as the result of a license from the State and as the State exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the State as if they were domestic corporations, it follows that the limitations of the State law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law."<sup>122</sup>

This reasoning the Supreme Court rejected:

"And this argument we declared unsound since the 'proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the

Costa Rica: Corporation Law, art. 151, amended by Law No. 10, of Dec. 3, 1929, art. 1 (1).

Rumania: C. Com. arts. 246(1), 247.

<sup>121</sup> To this effect, HERRERA REYES, *Sociedades Anónimas* (Santiago 1935) 274, 275, commenting on Decree-Law No. 251, of May 20, 1931, art. 123 (c) and (d).

<sup>122</sup> *New York Life Ins. Co. v. Head* (1913) 234 U. S. 149 at 163.

business of such company outside its borders and which would otherwise be beyond the State's authority. . . .'<sup>123</sup>

Some laws, however, extend their realm beyond any such limits. They either establish imperative requirements respecting the structure of licensable organizations, or they seem to subject transactions of licensed organizations to their law of the forum without restriction.

In the first respect, some Latin-American laws employ careless language in subjecting foreign corporations doing business in the country to the internal laws.<sup>124</sup> The authorities of many Latin-American republics, as an American writer explains, show "great reluctance to allow qualification of a foreign corporation which presents, in its charter or by-laws, provisions in conflict with local legislation."<sup>125</sup> Thus, usually, unlimited corporation life is forbidden.<sup>126</sup> Sometimes, some higher proportions for subscription stock and paid-in stock are prescribed, or a fixed percentage of the profits must be allocated to a reserve fund, or the corporation may be dissolved if the capital structure is deteriorated over a fixed percentage.<sup>127</sup>

In the second respect, where a statute sweepingly declares that the relations of the organization to third parties, or even all commercial operations of the branch shall be subject to the laws of the country,<sup>128</sup> the formula raises an issue. If

<sup>123</sup> *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357 at 376.

<sup>124</sup> E.g., Colombia: Law No. 58 of 1931, art. 22 *in fine*.

<sup>125</sup> GRANT, 8 Tul. L. Rev. (1934) 556 at 558.

<sup>126</sup> GRANT, *supra* n. 125.

<sup>127</sup> GRANT, *supra* n. 125.

<sup>128</sup> Spain: C. Com. art. 15, and its followers, *supra* p. 180.

Hungary: See GUNDISCH, 4 Z. Osteurop R. (1937-38) 293, 295.

Brazil: Decree No. 434, of July 4, 1891, art. 47 applied the law of the forum to all "relations, rights and duties between company, creditors, shareholders and every person interested." Art. 68 of Decree-Law No. 2627, of Sept. 26, 1940 seems more modest, see *supra* n. 119 and CRAWFORD, 16 Tul. L. Rev. (1942) 228 at 237 (last lines), subjecting the companies to the laws and tribunals "as to the acts or operations practised in Brazil." But the Introductory Law of 1942, art. 11 § 1, declares the companies having branches etc. in Brazil obligated to have their constitutive acts approved by the gov-

this includes the private law,<sup>129</sup> it may mean that the company and a resident of the state in question are forbidden to conclude their contract in another state under the foreign law, since some codes in fact seem to pretend that the parties may not submit their contract made in the state to any other law. Actually, extensive claims of *lex fori* are raised in several Latin-American laws. Nevertheless, one would think, at least, that the "laws" of the country imposed upon the foreign corporation include this country's own conflicts rules.

Definitely objectionable are unqualified provisions such as in the Turkish law,<sup>130</sup> that the company must "submit to all laws and regulations of the country," in Peru that foreign companies are subject, "without any restrictions to the laws of the Republic,"<sup>131</sup> or in Ecuador that this applies to all questions arising in or outside of court.<sup>132</sup>

On the usual requirements for licensing in this country that the foreign corporation shall be subject to all the restrictions and duties imposed on similar domestic corporations and shall have no other or greater rights, powers, or privileges, it would be repetitious to observe the exaggerations contained in these clauses.<sup>133</sup>

In quite a different connection, we have encountered the provision introduced in the Codes of Liechtenstein and

ernment making themselves subject to the Brazilian laws (*ficando sujeitas à lei brasileira*). This law and ESPINOLA, 8-C Tratado 1406, 1781, §§ 100, 101, emphasizing this text, fail to explain whether this subjection extends to matters other than those of the Brazilian business places.

<sup>129</sup> Probably it does not in Cuba, C. Com. art. 15 ("mercantile operations within Cuban territory") and similar provisions in Honduras, Nicaragua, and Mexico, *supra* n. 32.

<sup>130</sup> Turkey: Law of Nov. 30, 1330/1914, art. 13; *cf.* SALEM, 7 Répert. 250 No. 132.

<sup>131</sup> Peru: Constitution (1933) art. 17.

<sup>132</sup> Ecuador: Companies Law of Oct. 15, 1909, art. 7.

<sup>133</sup> *Supra* pp. 149ff. Special rules for particular classes of corporations may be excepted. For foreign building and loan associations, Colorado, Stat. Ann. (Michie 1935) c. 25 § 42 anomalously provides that "all contracts made with citizens of this state shall be deemed as made under Colorado laws."

Yugoslavia, declaring the permanent agency of a foreign business association, inscribed in the register of commerce, to be legally existent and capable of acting to the same extent as a similar domestic corporation.<sup>134</sup> This provision grants security to third parties, particularly in the case of dissolution of the mother corporation.

## 6. Special Purposes

Territorial law will reasonably take on a broader scope when particular purposes call for intensified control, as in the case of insurance, credit, railroad or other public transportation, or communication or similar business of public significance. Thus, in this country, the regulations regarding domestic corporations have largely been applied to foreign organizations, in such fields as savings and building loans, and full domestication, involving transformation into a domestic corporate entity, has often been required in the case of railroad or generally public services.<sup>135</sup>

## V. SANCTIONS OF TERRITORIAL IMPOSITIONS

If the duties imposed by the local law are violated, the effect is naturally governed by this law itself, and each provision needs its own construction. However, certain effects on contractual obligations, following the two requirements of licensing and of registration are of peculiar significance.

<sup>134</sup> Liechtenstein: P. G. R. § 236 par. 4.

Yugoslavia: C. Com. § 503 par. 5; see EISNER, 1 Symmikta Streit 296. *Supra* Chapter 22, p. 151.

<sup>135</sup> United States: See Restatement § 169 comment d; FLETCHER, 17 Cyc. Corp. § 8386; 18 A. L. R. 124ff., 72 A. L. R. 105; 23 Am. Jur. §§ 121, 387; Régimen Jurídico 6-25, 73-92. For some comparative notes see E. R. SALEM, Clunet 1938, 681.

For France: NIBOYET 374 No. 314, and for insurance companies, NIBOYET, 2 Traité 361 §§ 828ff.

For Latin-American countries: Código Bustamante, art. 253; Cuba: CRAWFORD, "Cuban Corporations," 10 Tul. L. Rev. (1936) 568.

## I. Failure to Obtain Authorization to Do Business

*United States.* The extensive discussion of the first question in the United States, nourished by an abundance of statutes and cases, has been summarized in a comprehensive note in the Restatement (§ 179). Nevertheless, the matter is too confused to allow more than a survey of the most significant phases.<sup>136</sup> In Williston's judgment, the decisions of the courts, "do not seem generally based on very secure or sound distinctions."<sup>137</sup> The texts of many statutes, particularly the older ones, are of little avail, as they are fragmentary and use such terms as "unlawful," "void," "voidable," "valid" in an unreliable manner. Moreover, many statutes have been changed in recent times, several repeatedly, so as to make previous summaries and annotations antiquated.

The outstanding problem is that of the effect of a contract concluded by a foreign corporation in the state without compliance with the statutory requirements for doing business. Beale distinguishes only two classes of authorities, those holding the contract valid and those that hold it void.<sup>138</sup> This is misleading, whereas, on the other hand, regard to all particularities of the various regulations has had the opposite defect of obscuring all leading ideas. That there are, in effect, four classes of statutes, may be gathered from the construction given them by the state courts or from their apparent meaning.

It may be noted, at the outset, that there is a common sanction of fine for noncompliance, appearing in the statutes of most states.

<sup>136</sup> Valuable suggestions are contained in the classification by LORENZEN, 6 Répert. 370, and in such decisions as *Perkins Mfg. Co. v. Clinton Construction Co.* (1930) 211 Cal. 228, 295 Pac. 1, followed in 75 A. L. R. 439 by a comprehensive annotation. It is regrettable that all surveys are satisfied with indicating cases almost without any regard to the current statutes which have very often been changed (*cf.* the characteristic warning to the reader in 136 A. L. R. 1161, *I in fine*; 23 Am. Jur. (1933) 575 n. 20).

<sup>137</sup> WILLISTON, 6 Contracts 5028 § 1771.

<sup>138</sup> 2 BEALE §§ 179.24-25.

(i) In a small group of states, noncompliance does not in any way prejudice the rights and duties arising from a contract concluded in the state.<sup>139</sup> The significance of this liberal attitude will be illuminated by the description of the other groups.

(ii) A larger class of statutes<sup>140</sup> is exemplified by the New York statute concerning other than "moneyed corporations," which has been construed by the highest court of New York

<sup>139</sup> Delaware: Rev. Code (1935) c. 65 § 220 (only a fine imposed).

District of Columbia: Code (1940) § 13-103 (provides only for service of process after repeated changes).

Georgia: Code Ann. (Park 1936) § 22-1501, in accord with *Alston v. New York C. P. Corp.* (1927) 36 Ga. App. 777, 138 S. E. 270.

Kansas: Gen. Stat. Ann. (Corrick 1935) § 17.501 and 1943 Supp.; *Heart of America Ins. Agency v. Wichita Cab and Transport Co.* (1940) 151 Kan. 420, 423, 99 Pac. (2d) 765, 767.

Kentucky: Rev. Stat. (1946) §§ 271.055, 271.990; *Williams v. Dearborn T. Co.* (1927) 218 Ky. 271; 291 S. W. 388, overruling *Fruin v. Chatterson* (1912) 146 Ky. 504, 143 S. W. 6.

Nebraska: Rev. Stat. (1943) § 21-1201, 1206, 1209, 1210 (misdemeanor to act for noncomplying corporation, no denial of rights mentioned) superseding the law avoiding the contract quoted in *Henni v. Fidelity B. & L. Ass'n* (1901) 61 Neb. 744, 86 N. W. 475.

North Carolina: Gen. Stat. Ann. (Michie 1943) § 55-118.

South Carolina: Code Ann. (1942) §§ 7769, 7789 (only fines provided).

<sup>140</sup> California: C. C. § 408, as amended by L. 1933, c. 533 § 92.

Colorado: Stat. Ann. (Michie 1935) c. 41 §§ 111, 113 (changing previous milder law).

Connecticut: Gen. Stat. (1930) § 3491.

Florida: Stat. Ann. (1941) § 613.04.

Idaho: Code Ann. (1932) §§ 29-504, 29-505, 29-506, cf. § 29-503a, introduced 1940.

Illinois: Business Corp. Act of 1933, § 125, changing previous more rigid law quoted in *Automotive M. Co. v. American S. M. P. Corp.* (1924) 232 Ill. App. 532.

Indiana: Burns' Stat. Ann. (1933) § 25-314 (most statutes declare contracts not void, see Ind. Ann. to the Restatement, § 179).

Iowa: Code (1946) § 494.9.

Louisiana: Business Corp. Act, 1928, as amended by 3rd. Extra Session 1935, Act No. 8 § 1; previously contracts were enforceable under Act No. 267 of 1914, § 23, as amended by Act No. 120 of 1920, § 1. *Federal Schools v. Kuntz* (1931) 16 La. App. 289, 134 So. 118.

Maine: Rev. Stat. (1944) c. 49 § 124.

Maryland: Flack's Code Ann. (1939) art. 23 § 121.

Massachusetts: Ann. Laws (1932) c. 181 § 5.

Minnesota: Stat. (1945) § 303.20.

Nevada: Comp. Laws (1929) §§ 1842, 1848.



as establishing inability of the corporation to sue upon the contract, as the only penalty for noncompliance.<sup>141</sup> The contract, therefore, deserves the term of "valid," despite the fact that it is unenforceable by the corporation in the state courts. Two important consequences have been drawn. First, the party dealing with the corporation is bound to the contract in a perfectly normal manner. He is unable to avoid the contract on other grounds than those of the ordinary law of contracts; there is no failure of consideration on the part of the corporation, until the corporation refuses performance.<sup>142</sup> Second, the corporation itself is able to sue on the contract in the courts of other states and in the federal courts, even those sitting in the state of noncompliance itself.<sup>143</sup> The latter restriction on the statutory sanction is the more significant, as no state has the power to exclude by statute the right of a party to remove a suit to the federal courts.<sup>144</sup>

New Hampshire: Rev. Laws (1942) c. 280 § 12.

New Mexico: Stat. Ann. (1941) §§ 54-805, 807; *Niblack v. Seaberg Hotel* (1938) 42 N. M. 281, 76 Pac. (2d) 1156.

New York: Gen. Corp. Law, § 218 (see *infra* n. 166).

North Dakota: Rev. Code (1943) §§ 10-1709, 10-1735, 10-1737 (L. 1937, c. 116 § 20a).

Ohio: Page's Gen. Code Ann., § 8625-25.

Pennsylvania: Business Corp. Law (1933) § 1014, as amended by L. 1945, Act No. 373.

Rhode Island: Gen. Laws Ann. (1938) c. 116 § 67.

Virginia: Code Ann. (1942) § 3848.

Washington: Rem. Rev. Stat. (1932) Supp. § 3836-12.

West Virginia: Code Ann. (Michie 1943) § 3091; *Ober v. Stephens* (1903) 54 W. Va. 354, 46 S. E. 195.

<sup>141</sup> See 2 BEALE 855 quoting *Gray, J.*, in *Neuchatel Asphalte Co. v. Mayor of New York* (1898) 155 N. Y. 373, 49 N. E. 1043; *cf. Fritts v. Palmer* (1889) 132 U. S. 282.

<sup>142</sup> See *Mahar v. Harrington Park Villa Sites* (1912) 204 N. Y. 231, 234, 97 N. E. 587; *Alsing Co. v. New England Quartz & Spar Co.* (1901) 66 App. Div. 473, *aff'd*, 174 N. Y. 536.

<sup>143</sup> *David Lupton's Sons Co. v. Automobile Club of America* (1912) 225 U. S. 489; *Republic Creosoting Co. v. Boldt C. Co.* (C. C. A. 6th 1930) 38 F. (2d) 739; *Metropolitan Life Ins. Co. v. Kane* (1941) 117 F. (2d) 398; 133 A. L. R. 1163, and Annotation, *id.* 1171; see 2 BEALE 859 n. 5 and Restatement § 178.

<sup>144</sup> Restatement § 171; *Terral v. Burke Construction Co.* (1922) 257 U. S.

Under this approach, it may be asked: What extraterritorial effect will result from a judgment of the state of non-compliance, dismissing the action of a foreign corporation on the ground of the failure to qualify? Although the problem apparently never has been raised,<sup>145</sup> it would seem that such judgment would not have the effect of *res judicata*.

(iii) A third group is characterized by much more severity.<sup>146</sup> The corporation is deprived not only of the right to be a party in the courts of the state in question but of its rights under the contract. It follows, on the one hand, that the other party is given in effect the option of suing on the contract or cancelling it. On the other hand, the corporation is prevented from suing in other than the state courts. For whether the statute maintains or prohibits with annulling effect transactions of a nonqualifying corporation, it is recognized in the

529; *Strampe v. Minnesota Farmers' Mutual Ins. Co.* (1909) 109 Minn. 364, 123 N. W. 1083; Ann., 26 L. R. A. (N. S.) 999; Ann. Cas. 1914A 706.

<sup>145</sup> Incapacity to sue is generally considered a bar to come into court as contrasted with the elements of the cause of action which give the right to relief in court. See 6 Cycl. of Fed. Procedure (ed. 2, 1943) 148 § 2100.

<sup>146</sup> Alabama: Code Ann. (1940) tit. 10 § 191; *Boddy v. Continental Inv. Co.* (1921) 18 Ala. App. 65, 88 So. 294.

Arkansas: Pope's Dig. (1937) § 2251.

Michigan: Gen. Corp. Act, §§ 93, 95; *Hoskins v. Rochester S. & L. Ass'n* (1903) 133 Mich. 505, 95 N.W. 566.

Missouri: Gen. and Bus. Corp. Act, § 109; *Flinn v. Gillen* (1928) 320 Mo. 1047, 10 S. W. (2d) 923.

Oklahoma: Stat. Ann. (1941) tit. 18 § 454; *M. S. Cohn G. Co. v. Southern S. Co.* (1927) 129 Okla. 171, 264 Pac. 206 ("contracts void at the option of citizens of the state"), cf. 75 A. L. R. 450, 451.

Oregon: Comp. Laws Ann. (1940) §§ 77-306, 77-307, 77-207.

South Dakota: Code Ann. (1939) § 11.2103.

Tennessee: (Doubtful whether the contract is not considered absolutely void, see n. 121) Code Ann. (1938) § 4119; *Insurance Co. v. Kennedy* (1896) 96 Tenn. (12 Pick) 711, 36 S. W. 709; *Harris v. Columbia Water Co.* (1901) 108 Tenn. (24 Pick) 245, 67 S. W. 811; *Peck-Williamson Heating etc. Co. v. McKnight* (1918) 140 Tenn. (13 Thomp.) 563, 205 S. W. 419; *State Life Ins. Co. v. Dupre* (1935) 19 Tenn. App. 301, 86 S. W. (2d) 894, 897.

Texas: Vernon's Rev. Civ. Stat. (1925) art. 1536, as amended by L. 1931, c. 158.

Utah: Code Ann. (1943) § 18-8-5.

Vermont: Pub. Laws (1933) § 5988.

Wisconsin: Stat. (1943) § 226.02; *Fitzsimmons v. City Fire Ins. Co. of New Haven* (1864) 18 Wis. 246, 86 Am. Dec. 761.

sister states; hence, if the statute appears to treat the contract as void or voidable,<sup>147</sup> other jurisdictions recognize its effect accordingly.

While usually the contract is called "void" and might be better denoted as "voidable" in these jurisdictions,<sup>148</sup> yet either term is inadequate.

(iv) Finally, there may be states in which the unlawful contract is entirely "void," meaning that no action is granted either party in any court.<sup>149</sup>

These "penalties," if radically executed, may cause considerable hardship. In most of the jurisdictions involved, this has been well noticed, and important mitigations have been introduced. Always, however, at least a few states insist on a radical sanction. Thus, for instance, it is fair that a corporation should be allowed to make contracts preliminary to starting business, such as the purchase of equipment, supplies, and raw materials, appointment of agents or acquisition of a business. While a distinct trend to exempt such preparatory transactions from the ban is developing, it is far from a complete victory.<sup>150</sup> The main relief for foreign corporations that have failed to qualify, is furnished by the proviso, now widely prevailing, that the corporation is prevented from suing only "until" it

<sup>147</sup> *Allegheny Co. v. Allen* (1903) 69 N. J. Law 270, 55 Atl. 724; *Hyde v. Goodnow* (1849) 3 N. Y. 266; *Wood v. Cascade Fire & Marine Ins. Co.* (1894) 8 Wash. 427, 36 Pac. 267 (concerning the New York law on insurance companies) but cf. *Restatement, New York Annotations* 146.

<sup>148</sup> See for Michigan and Wisconsin, *Bishop v. Hannan Real Estate Exchange* (1934) 267 Mich. 575, 255 N. W. 599; see *Martin Bros. v. Nettleton* (1926) 138 Wash. 102, 244 Pac. 386 (dictum: the "penalty" by the statute of Oregon measures the remedy of the individual who deals with the corporation not complying with the statute.)

<sup>149</sup> *Arizona: Code Ann.* (1939) § 53-802, as construed in *Eastlick v. Haywood* (1928) 33 Ariz. 242, 263 Pac. 936: "It is probable that no action of a party dealing with a foreign corporation which failed to comply . . . , can give the transaction validity."

*Tennessee: Code* (1943) § 4119, as construed in *Peck-Williamson Heating etc. Co. v. McKnight* (1918) 140 Tenn. (13 Thomp.) 563, 205 S. W. 419; *State Life Ins. Co. v. Dupre* (1935) 19 Tenn. App. 301, 86 S. W. (2d) 894, 897. A long list of cases given by 2 BEALE 860 n. 7 is antiquated.

<sup>150</sup> See 23 Am. Jur. (1939) *Foreign Corporations* §§ 367, 368.

complies with the requirements. Yet in a few states, belonging to classes (ii) and (iii), this validating and retroactive effect of compliance subsequent to the prohibited contract is expressly denied.<sup>151</sup> Generally contracts made outside the state may be sued upon.<sup>152</sup> Yet the excellent Pennsylvania Annotations to the Restatement think that the disability in this state includes any contractual claim wherever it arose.<sup>153</sup> The courts are inclined, moreover, to grant suits for injuries to property, even though there is connection with unauthorized business, as where the corporation has assigned goods to an agent for sale on commission;<sup>154</sup> but a few statutes deny claims sounding in tort as well as in contract.<sup>155</sup> It is also ordinarily, though not without exception, assumed that claims may be based on the ownership of property or possession, including acquisitions of title, not immediately connected with doing business.<sup>156</sup>

Obviously, therefore, prohibitions of "all court actions"<sup>157</sup> ought to be understood with restrictions, although, in an opinion of the Attorney General of Louisiana, "any action in the courts of the state" is declared precluded, even to a

<sup>151</sup> New York Gen. Corp. Law, § 218, *cf.* Restatement, New York Annotations § 179.

Tennessee: Code Ann. (1943) § 4119. See *Cary-Lombard L. Co. v. Thomas* (1893) 92 Tenn. 587, 22 S. W. 743.

Wisconsin: Stat. (1943) § 226.02; *Wisconsin Trust Co. v. Munday* (1918) 168 Wis. 31; 168 N. W. 393, 169 N. W. 612, *aff'd* *Munday v. Wisconsin Trust Co.* (1920) 252 U. S. 499.

In Idaho, Law of 1940, see 1940 Supp. to Code Ann. (1932) tit. 29 c. 5, 224, belated filing was allowed only once within three months after the provision came into force. *Cf.* WILLISTON, 6 Contracts § 1772 n. 2.

<sup>152</sup> *Leverett v. Garland* (1921) 206 Ala. 556, 90 So. 343; 2 BEALE 856 n. 4, 858 n. 5.

<sup>153</sup> Restatement, Pennsylvania Annotations 78 § 178.

<sup>154</sup> See 2 BEALE 857; Note, 136 A. L. R. (1942) 1160.

<sup>155</sup> Indiana: Burns' Stat. Ann. (1933) § 25-314.

Wyoming: Rev. Stat. Ann. (1931) § 28-141 A, added in 1939.

<sup>156</sup> See 2 BEALE 856 § 179.23; Restatement § 179 note; Note, 136 A. L. R. (1942) 1160.

<sup>157</sup> Maryland: Flack's Ann. Code (1939) art. 23 § 119.

Missouri: Gen. and Bus. Corp. Act, § 109.

North Dakota: Rev. Code (1943) § 10-1735.

foreign corporation solely engaged in interstate business, unless the corporation has qualified to do business and all taxes due have been paid.<sup>158</sup>

If we try, after all this, to ascertain the exact position of a noncomplying corporation having wholly or partly performed its own contractual obligations, when the other party refuses performance and restitution, the situation seems to be as follows:

If the contract is valid under the violated statute but the corporation may not sue in the state courts for enforcement of the other party's duty, it may, nevertheless, even in these courts claim restitution on the ground of failure of consideration, with any of the normal remedies.

Where the contract is "void," we do not find any secure doctrine. Only a handful of cases belonging to two or three jurisdictions illustrate the situation.

Several Michigan decisions have the merit of establishing with clear foundation the right of a noncomplying corporation to revindicate ownership of a movable which it has retained unconditionally<sup>159</sup> or under a conditional sale.<sup>160</sup> They recognize that, if a contract is void because the plaintiff had no authorization, it does not follow that it must forfeit its property to the defendant.<sup>161</sup> This answers the argument, expressed for instance in Tennessee, that the Singer Manufacturing Co. could not be allowed to recover a machine sold conditionally on default of the buyer in payment, because "to allow it would be to enforce the contract . . . and to put a premium on its violation of law."<sup>162</sup> But a federal court in

<sup>158</sup> Louisiana: Opinions of the Attorney General 1936-38, 125.

<sup>159</sup> Klatt v. Wayne C. Judge (1920) 212 Mich. 590.

<sup>160</sup> Mojonnier Bros. v. Detroit Milling Co. (1925) 233 Mich. 312; cf. Tuttle, J., in *In re Rosenbloom* (1922) 280 Fed. 139.

<sup>161</sup> Rex Beach Pictures Co. v. Harry I. Garson Production (1920) 209 Mich. 692, 706.

<sup>162</sup> Singer Mfg. Co. v. Draper (1899) 103 Tenn. 262.

Minnesota correctly adds that also an agreement of absolute sale is equally void "so that there is no contract and the title has never passed from the corporation to the buyer."<sup>163</sup> Hence, actions of detinue or replevin as well as trover for conversion,<sup>164</sup> and cross bills at the suit of the other party are available. Where a bill was brought to set aside foreclosure proceedings and cancel a mortgage on the ground that the defendant was a foreign corporation unlicensed in Michigan, the bill was dismissed. The plaintiff could not equitably rescind the contract and fail to tender the amount due.<sup>165</sup>

In the New York case establishing the principle that the contract is valid, Cullen, C. J., in a remarkable concurrent opinion added that, even if the contract were considered void, until a foreign corporation refuses to fulfill, the buyer would not be entitled to recover back the money paid under the contract, good or bad.<sup>166</sup>

In a Missouri case a cross bill for assumpsit for money had and received was granted to an Arkansas corporation, to recover a large sum advanced for lumber which the plaintiff did not deliver. The federal court said:

"Every principle of justice and fair dealing requires that it should pay back this money to defendant. . . . One cannot make a shield of a void contract to rob an associate."<sup>167</sup>

Should this not be true when the corporation has furnished

<sup>163</sup> *Dunlop v. Mercer* (1907) 156 Fed. 545.

<sup>164</sup> *Lu-Mi-Nus Signs Co. v. Regent Theatre Co.* (1930) 250 Mich. 535.

<sup>165</sup> *Windisch v. Mortgage Security Corp. of America* (1931) 254 Mich. 492, 236 N. W. 880.

<sup>166</sup> *Mahar v. Harrington Park Villa Sites* (1912), *supra* n. 141, 204 N. Y. 231, at 237, 97 N. E. at 587.

The New York court constantly supports also the wholesome analogous doctrine that failure to procure an occupational or business license, excepting an express statutory provision, is not deemed to make a contract void. Denying recovery would be "a ruling wholly out of proportion to the requirement of public policy." *John E. Rosasco Creameries v. Cohen et al.* (1937) 276 N. Y. 274, 11 N. E. (2d) 908; *cf.* Annotation, 118 A. L. R. 646.

<sup>167</sup> *Lasswell Land & Lumber Co. v. Lee Wilson & Co.* (C. C. A. 8th 1916) 236 Fed. 322, *cert. denied* 242 U. S. 652.

material and work, and the compensation is refused? The question has come up repeatedly in Alabama and has been consistently negatived by rejecting any action of quasi-contract.<sup>168</sup> The federal court, following the view of the Supreme Court of Alabama, resumes the position:

"The fact that the statutory prohibition is directed against the performance as well as the making of the contract is convincing that no action can be maintained upon the implied contract or upon a *quantum meruit*."<sup>169</sup>

Yet, the Alabama Supreme Court itself, as early as 1911, confessed:

"Viewed solely from the standpoint of the individuals concerned, the apparent result of this conclusion is, it must be conceded, abhorrent to the judicial conscience."<sup>170</sup>

The same court repeated this regret in refusing to enter into examination of a case where a bank building had been furnished with marble trimmings and other fixtures and installations on disputed oral orders for changes.<sup>171</sup> This disregards the fact that "implied contract" is only a manner of speech, while the undue enrichment results from the invalidity of the contract and not from the contract.

This radical view seems not to have been expressed in any other jurisdiction, but neither is such an action known to have been brought anywhere except in Alabama.<sup>172</sup> Could it be that counsel are still unfamiliar with the remedies against undue enrichment?

<sup>168</sup> Leading case, *Dudley v. Collier* (1888) 87 Ala. 431, 6 So. 304; *accord*, *Alabama Western R. Co. v. Talley-Bates Construction Co.* (1909) 162 Ala. 396, 402, 50 So. 341, and see the three following notes.

<sup>169</sup> *Thomas v. Birmingham Railway Light and Power Co.* (1912) 195 Fed. 340.

<sup>170</sup> *American Amusement Co. v. East Lake Chutes Co.* (1911) 174 Ala. 526, 56 So. 961 (improvement of an immovable).

<sup>171</sup> *George M. Muller Mfg. Co. v. First National Bank of Dothan* (1912) 176 Ala. 229, 57 So. 762.

<sup>172</sup> *Amos Bridge's Sons, Inc. v. State of New York* (1921) 188 App. Div. 500, 231 N. Y. 532, sometimes cited in this connection, rejects an action for

If in a state of class (ii), prohibiting the corporation from suing but without invalidating the contract, the other party elects to sue on the contract, the corporation has the right of defense, which means that it may claim any right arising out of the contract, but in some statutes even this is prohibited.<sup>173</sup> Finally, if the contract has been executed on both sides, invalidity may not be further claimed.<sup>174</sup>

In a number of statutes it is stated that the directors, officers, or other persons acting on behalf of the corporation, contrary to the licensing provisions, are personally liable, if more than one, jointly and severally;<sup>175</sup> in another group, they are punishable as for a misdemeanor.<sup>176</sup> Most statutes are silent on the point. It seems settled that whether or not the contract is valid in regard to the corporation, the agents may not be sued except where the statutes so provide.<sup>177</sup>

Complicated situations arise, if contracts made lawfully in one state are to be performed in another where the corporation

damages for delay having increased the costs of building a state street. The parties disputed whose fault the delay was. In this case, at least, the work employer was not enriched and the action could correctly be qualified as based on the contract.

<sup>173</sup> Arkansas: Pope's Dig. § 2251.

California: C. C. § 408.

Connecticut: Gen. Stat. (1930) § 3491.

Illinois: Stat. Ann. (Smith-Hurd 1934) c. 32 § 157.125; Ryerson & Son v. Shaw (1917) 277 Ill. 524, 115 N. E. 650.

Indiana: Burns' Stat. Ann. (1933) § 25-314.

Iowa: Code (1946) § 494.9 (2 Annotations 775 but see also 774 for notes on the same case).

Maine: Rev. Stat. (1944) c. 49 § 124.

Montana: Rev. Code Ann. (1935) § 6653.

<sup>174</sup> See 2 BEALE 862; FLETCHER, 17 Cyc Corp. §§ 8527, 8531, ns. 44, 45.

<sup>175</sup> Colorado: Stat. Ann. (Michie 1935) c. 41 § 113.

Idaho: Code Ann. (1932) § 29-506.

Massachusetts: Ann. Laws (1932) c. 181 § 5.

Utah: Code Ann. (1943) § 18-8-5.

Virginia: Code Ann. (1942) § 3848.

Wyoming: Rev. Stat. Ann., § 28-204.

<sup>176</sup> See Indiana: Burns' Stat. Ann (1933) § 25-314.

Iowa: Code (1946) § 494.13.

Montana: Rev. Codes (1935) § 6656.

<sup>177</sup> See Karvalsky v. Becker (1940) 217 Ind. 524, 29 N. E. (2d) 560.



has not qualified for doing business. The Restatement has attempted to reach a uniform solution.<sup>178</sup>

On many problems, however, the courts are divided. In particular, on the important topics of estoppel and recovery of chattels sold on conditional sale, the prevailing liberal trend encounters more substantial opposition.

Public policy was the ground of objection to the recognition of a foreign statute in one Illinois case. The court held that an Illinois corporation, contracting in another state in good faith and partly executing the contract, had a good cause of action in the forum and could not be turned away because the action could not be maintained in the other state.<sup>179</sup>

*Other countries.* In Austria it has been discussed whether a foreign insurance company, not admitted to do business in the country, may sue,<sup>180</sup> and the general question is doubtful whether persons not admitted by administrative license can validly engage in contracts.<sup>181</sup> The liberal view has been maintained in Czechoslovakia<sup>182</sup> and Prussia.<sup>183</sup>

The German law on stock corporations of 1937 prescribing licensing of business seems not to impede either recognition of the foreign corporation's personality or the efficacy of

<sup>178</sup> Restatement § 180; cf. the divided cases of Restatement, Michigan Annotations § 180.

<sup>179</sup> *Hunter W. Finch & Co. v. Zenith Furnace Co.* (1910) 245 Ill. 586 at 594, 92 N. E. 521 at 524, *aff'd*, 146 Ill. App. 257.

<sup>180</sup> Denied by OGH. (July 2, 1903) GIU. NF. 2398, 13 Z.int.R. 463. *Contra*: the Appeal Court, see WALKER 204; PISKO cited by WIELAND, 43 Z.Schweiz.R. (N. F.) at 227 who seems to approve for all of Central Europe.

<sup>181</sup> For invalidity OGH. (May 8, 1912) GIU. NF. 5910; (May 20, 1913) GIU. NF. 6453. *Contra*: OGH. (June 5, 1901) GIU. NF. 1449 and WALKER 206.

<sup>182</sup> S. Ct. Nos. 2863, 3609, 5820, 6409, cited by LAUFKE, 7 Répert. 186 No. 59.

<sup>183</sup> Prussia: Law of June 22, 1861, Preuss. Ges. Samml. 1861, 441 § 18 (1) has sanctions in the law of January 17, 1845, Preuss. Ges. Samml. 1845, 41 at 75, §§ 176, 177, 189 not including the nullity of transactions. More severe are the special laws regarding insurance. In the case of a domestic insurance company doing unauthorized business in another German state, voidness of the policy has been recognized under § 134 BGB. by OLG. Hamburg (May 23, 1907) Leipz.Z. 1908, 249.

contracts concluded without compliance. In all cases, the state agencies may stop unauthorized carrying on of business.<sup>184</sup>

In Latin-American jurisdictions, noncompliance is commonly stated as a ground for individual and collective liability of the persons who conclude a contract on behalf of the corporation.<sup>185</sup> Whether this is an indication that the company itself cannot be sued,<sup>186</sup> seems doubtful. For in a few statutes it is expressly declared that both may be sued.<sup>187</sup> On the right to sue, the doubts seem to be analogous to those experienced in the United States.

*Appraisal.* The fact that a foreign corporation intrudes into a jurisdiction without having obtained permission to enter, should certainly not excuse it from any liability that it would incur if doing lawful business there. For this reason, rules are wrong that deny all effect to transactions made in the state. But, on the other hand, no better solution is reached by giving an option to the other party either to enforce the contract or to hide behind its invalidity. Such privilege will naturally be exercised according to how the business venture inherent in the contract turns out. But a legally riskless gamble should not be included in a statutory provision intended to serve the public interest.

This one-sided justice, however, is much restricted in most jurisdictions of the United States, inasmuch as the corporation may sue on the contract by belatedly qualifying for doing

<sup>184</sup> BEITZKE, *Jur. Personen* 166.

<sup>185</sup> Expressly foreseen in Guatemala, C. C. (1933) art. 26; Legislative Decree No. 1370, of April 16, 1925, art. 2.

<sup>186</sup> Régimen Jurídico 34ff., 100ff.

<sup>187</sup> The models were the Italian C. Com. art. 231, and the Portuguese C. Com. art. 112.

Brazil: C. Com. art. 301 par. 3 (action against all members of a non-registered company).

Chile: C. Com. art. 468 par. 2, followed by:

Ecuador: C. Com. art. 326.

Guatemala: C. Com. (1942) art. 418.

Venezuela: C. Com. (1919) art. 362 (new 337).

business. Also other restrictions to the provision denying the right to sue have been recognized. Nevertheless, it happens sometimes in this country and seemingly much more often abroad that the other party may retain values received on execution of the contract as pure enrichment. This principle is of a rather doubtful morality. Noncompliance with general statutory impositions should not grant other private parties free speculation nor unearned gains. In addition, the deprivation of contractual rights, though not an unconstitutional impairment, is essentially a punishment executed without the guaranty of regular criminal investigation and judgment, which, in contrast to normal penalties, is enforceable in third states.<sup>188</sup> Moreover, when a case is on the border line between "carrying on" business and "isolated" acts,<sup>189</sup> too much depends upon the answer when the validity of the contract is also at stake.

The Uniform Foreign Corporations Act, in a comparatively moderate proposal, reduces all penalties for doing unlawful business to fines supposed to be severe and a stay of any action instituted by the corporation until license is procured or a year has expired after the stay.<sup>190</sup> The commissioners were afraid that, if the foreign corporation had no

<sup>188</sup> See *Allegheny Co. v. Allen* (1903) 69 N. J. Law 270, 55 Atl. 724. In a particular case, the Supreme Court of Indiana has felt the necessity of justifying why it could apply the statute of West Virginia making officers of a foreign, noncomplying insurance company personally liable on the contract: "It is a penalty designed primarily to provide a private remedy to a person injured by a wrongful act," *Karvasky v. Becker* (1940) 217 Ind. 524, 29 N. E. (2d) 560. However, this could not be said with respect to an unreciprocated suit of the third party. See furthermore, *supra* n. 147.

<sup>189</sup> That in many cases this border line may be difficult to trace, is confirmed by the considerations of the Bar Commissioners stating that "it must be borne in mind that frequently the question as to whether or not a foreign corporation is doing business in a state and thus as to whether or not it must secure a license, is a question involving fine distinctions and one which is not so readily answerable. A foreign corporation may, therefore, violate the act by doing business without a license and yet be innocent of any willful intention to do wrong. For this reason the provisions for penalty must be flexible." National Conference of Commissioners, Handbook 1934, 328.

<sup>190</sup> *Id.* §§ 25-27 and comment 328-330.

property in the jurisdiction, the fine could not be enforced. But a successful suit would produce just the desired assets in the state. Administrative regulations should consistently refrain from interfering with private law and civil procedure. Of course, in most foreign countries, acceptance of the principle of the draft would present an enormous progress.

## 2. Failure to Register

Prevailingly, the provisions that prescribe registration of foreign corporations have the same effect as those applying to domestic corporations. Most have merely "declaratory" effect, i.e., they are destined to make public the existence, conditions, and purpose of recognized organizations. The personality of foreign corporations, however, is not dependent either on compliance with the duty of filing or on the favorable decision of the registrar.<sup>191</sup> Hence, in countries such as England, Germany, Czechoslovakia, Yugoslavia and Switzerland,<sup>192</sup> contracts concluded by an unregistered but existing foreign company, whether domestic or foreign, are valid. Penalties, of course, are pronounced;<sup>193</sup> the evidentiary value of the company's books may be impaired, and the place of business may be threatened by closure.<sup>194</sup> Third persons who without fault ignore nonregistered facts are protected by the more elaborate legislations.<sup>195</sup> The agents may be declared

<sup>191</sup> HACHENBURG in 3 *Düringer-Hachenburg* (1934) 553 n. 31.

<sup>192</sup> England: Companies Act, 1929 (19 & 20 Geo. 5, c. 23) 500-502, Part XI, s. 344.

Germany: HGB. § 15 (implicit).

Switzerland: BG. (July 22, 1887) *Clunet* 1893, 240; WIELAND, 43

Z. Schweiz. R. (N. F.) 275 n. 128.

Austria: OGH. (February 5, 1929) *Clunet* 1930, 746.

Czechoslovakia: S. Ct. (May 5, 1934) No. 13511, 10 *Zausl.PR.* (1936) 169.

Yugoslavia: C. Com. § 231.

<sup>193</sup> England: Companies Act, 1929 (19 & 20 Geo. 5, c. 23) 500, Part XI, s. 351.

Yugoslavia: C. Com. § 512 par. 9.

<sup>194</sup> Expressly so Japan: C. Com. art. 260. *Cf.* Guatemala: Legislative Decree No. 1370, of April 16, 1925, art. 2 (for failure to appoint a representative).

<sup>195</sup> Germany: HGB. § 15, *Aktiengesetz* § 34.

collaterally liable for all debts incurred by them on behalf of the company,<sup>196</sup> although this is rejected in some countries, since under this system the corporation itself is answerable.<sup>197</sup> In Italy the problem has been extensively discussed on the basis of the Commercial Code of 1882, practically speaking, with the result that the only effect of nonregistration of a foreign corporation, having an agency or succursal in the country, was the liability, personal, joint and several, of the agents in addition to that of the corporation.<sup>198</sup> In the case of a French partnership, a juristic person, it was declared operating in Italy *de facto* and the partners to be liable without restriction.<sup>199</sup>

This system has also been adopted in Argentina and Venezuela.<sup>200</sup>

However some regulations are more severe. For instance, in Belgium the sanctions applicable to domestic as well as to those foreign corporations having a succursal or other business place in the country, are differentiated in various cases, and include the right by third parties to oppose being sued on a contract if the constitutive documents or the yearly balance are not published.<sup>201</sup> Colombia declares void all acts

<sup>196</sup> For Latin America, see *supra* n. 187.

<sup>197</sup> E.g., Czechoslovakia, S. Ct. (May 5, 1934) *supra* n. 192.

<sup>198</sup> Ital. Cass. (June 8, 1932) Foro Ital. Mass. 1932 III c. 431; App. Torino (January 7, 1936) Foro Ital. 1936 I 397; DIENA, 1 Dir. Com. Int. 245; BALLADORE PALLIERI in Riv. Dir. Com. 1929 I 207; CAVAGLIERI, Dir. Int. Com. 261, 263, 279, 284.

Similarly, Rumania, C. Com. art. 247.

<sup>199</sup> App. Cagliari (January 17, 1924) Riv. Dir. Com. 1924 II 441.

<sup>200</sup> Argentina: C. Com. art. 288 states only the personal liability of the agents; C. C. art. 36 declares authorized acts by agents of (any) corporation binding on the corporation.

Followed by Venezuela: C. Com. (1919) art. 362 (new 337), *cf* Goldstone, "The Judicial Status of Non-Registered Foreign Corporations in Venezuela," 17 Tul L. Rev. (1943) 578; personal liability of the acting persons, no obstacle for actions on contracts, no penalties.

<sup>201</sup> Belgium: Consolidated Companies Act 1873/1935, arts. 198 and 11; Cass. (March 24, 1930) Clunet 1930, 1113 (the action of a foreign company not having filed for publication of its acts is not "receivable." Trib. com. Bruxelles (June 27, 1936) Jur. Com. Brux. 1939, 55; (February 1, 1938)

executed without complying with the prescribed formalities.<sup>202</sup> The Japanese Commercial Code says that "a third person may deny the existence" of a nonregistered branch office as he may in the case of a nonregistered Japanese corporation.<sup>203</sup>

There is, however, much ingenuity deployed in the various laws. In Panama, for instance, the Commercial Code punishes noncompliance with the duty of registration by a penalty in money and the loss of the rights to exercise commercial privileges and to file documents for evidence; the stock corporation law provides that nonregistered companies cannot sue and also incur penalties up to 5,000 dollars.<sup>204</sup>

Finally, as has been seen earlier, registration is sometimes considered a condition precedent to recognition of the company's personality or, if this exaggerated manner of speech is avoided, to the lawfulness of business done in the state.

A similiar variety of views obtains with regard to the failure correctly to appoint a representative.

## VI. TREATIES

### 1. Existing Treaties

The two Latin-American multipartite, and the numerous bipartite treaties throughout the world, concerning establishment, commerce, or tax burdens, regularly provide for reciprocal treatment of corporations in decoratively styled clauses. However, the result is somewhat inadequate.

*id.* 1939, 61; see FRÉDÉRICQ, 2 Principes (1930) 575; *Novelles Belges*, 3 D. Com. No. 5283. App. Bruxelles (May 3, 1939) Jur. Port d'Anvers 1941, 30, 33, therefore, denied the right to sue to the United States Shipping Merchant Fleet Corporation, although not to the United States Government.

<sup>202</sup> Colombia: Legislative Decree No. 2 of 1906, art. 6.

Ecuador: Companies Law of Oct. 15, 1909, art. 14 for insurance companies in addition to pecuniary penalty.

<sup>203</sup> Japan: C. Com. art. 257. The defect, however, is cured by subsequent registration, Japan, S. Ct. (April 27, 1928) 1 C. Com. of Japan Ann. 410 case 167.

<sup>204</sup> Panama: C. Com. (1916) art. 296; Stock Corporation Law No. 32, of Feb. 26, 1927, art. 91.

(a) *Commercial clause.* The usual clause guaranteeing the carrying on of business runs substantially as in the Treaty between the United States and Poland of 1931, declaring that the right of corporations and associations of either Power to establish themselves within its territories, establish branch offices, and fulfill their functions therein, shall depend upon and be governed solely by the consent of such Party as expressed in its national, state, or provincial laws and regulations.<sup>205</sup>

(b) *Special clauses.* Essentially more substance is contained in a unique clause of the Treaty between France and Germany of 1934, prescribing that authorization for doing business cannot be refused for the reasons of contravention against the internal laws.<sup>206</sup>

Another special clause in the Treaty between Germany and the Soviet Union of 1926 states that an enterprise may not be impeded in the regular course of its business by laws, decrees, or other measures by authorities.<sup>207</sup>

(c) *Most-favored-nation clause.* Such provisions are considered to extend to all countries enjoying the rights of the most favored nation especially for the purposes of foreign organizations of the kind in question. Thus, the privileges conceded by Germany to France and Russia have been recognized in Germany also in favor of the United States on the

<sup>205</sup> United States-Poland Treaty, of June 15, 1931, art. 11, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407.

<sup>206</sup> Art. 2 par. 5, RGBl. 1934 II 423: The high contracting parties agree, however, not to hinder by the means of foregoing authorization, the establishment of companies exercising an activity generally permitted to companies of all other countries, and not to revoke a once-granted authorization, except in case of violation of laws and regulations of the country, and to refrain in addition from any denial or revocation exclusively grounded upon reasons of economical competition.

<sup>207</sup> Art. 17, RGBl. 1926 II 1.

Also the Treaty between Canada and France, of May 12, 1933, art. 7 (Revue Crit. 1937, 257) has been interpreted to the effect that Canadian companies for maritime insurance or reinsurance do not need in France the individual authorization otherwise required, see NIBOYET, 2 Traité 373.

ground of such a clause providing for reciprocity in the treaty between the United States and Germany.<sup>208</sup>

Whether the usual *general* stipulation guaranteeing the right of the most favored nation, covers the treatment of legal persons, is an old controversial problem. Prevailing opinion denies it.<sup>209</sup> But more recently special clauses have been added for this purpose. Thus, the United States has concluded treaties with detailed stipulations declaring the right of most favored nations as including the right to organize, control, participate in limited liability and other corporations and associations, for pecuniary profit or otherwise, or similarly to the same effect.<sup>210</sup>

(d) *Clause of reciprocity.* The traditional provision for reciprocity of treatment has significance, for instance, in Poland and Germany, while in most countries, as we have seen, licensing is not dependent on reciprocity. Beyond that, the clauses leave everything to the pleasure of the "laws and regulations" of each state. Nevertheless, such clauses stand unaltered in the Treaties of Montevideo<sup>211</sup> and Habana.<sup>212</sup>

<sup>208</sup> Treaty of Dec. 8, 1923, art. 12, U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141 RGBl. 1925 II 795, 800. See BEITZKE, Clunet 1937, 1004.

<sup>209</sup> See 2 LYON-CAEN et RENAULT 924 § 1102; LEREBOURS-PIGEONNIÈRE 213 § 181. See also E. SPRINGER, 27 Z.int.R. (1918) 314.

<sup>210</sup> Treaties of the United States: with Austria (June 19, 1928) art. 10, U. S. Treaty Series Nos. 838 and 839, 118 L. of N. Treaty Series (1931) 241 at 250;

with Germany (Dec. 8, 1923) art. 12, U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141;

with Turkish Republic (Oct. 28, 1931) art. 1, U. S. Treaty Series No. 859, 138 L. of N. Treaty Series (1933) 345 at 347;

with Poland (June 15, 1931) art. 11, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407;

with Greece (Nov. 21, 1936) art. 1, U. S. Treaty Series No. 930, 183 L. of N. Treaty Series (1937) 169 at 170;

with El Salvador (Feb. 22, 1926) art. 13, U. S. Treaty Series No. 827, 134 L. of N. Treaty Series (1932) 207 at 209.

<sup>211</sup> Treaty of Montevideo on International Commercial Terrestrial Law (1940) art. 8 par. 2.

<sup>212</sup> Código Bustamante, arts. 32-34.



## 2. Draft Proposals

Real progress has been sought through the efforts of numerous international congresses and committees, from the Paris Congress (1880) on stock companies to the Draft of the Experts of the League of Nations (1928) on juristic persons.<sup>213</sup> But, from the last instance, the preliminary draft of the Economic Committee of the League of Nations on the treatment of foreigners (1929),<sup>214</sup> it appears that an embarrassing struggle is going on between this endeavor and the deference to "the laws and regulations" of the territory in which activities are exercised. The draft subjects the doing of business to preliminary and revocable authorization, with no remedy against arbitrary refusal but the right of retaliation. But if authorization is once given, the proposal is that it should not be revoked except for infringement of the laws and regulations of the country.

## VII. CONCLUSIONS

1. The view expressed in old as well as recent American decisions as a natural conception that a state may exclude corporations created in other states from doing business in the forum, is just one of several theories of the past. For a time, it was also widely believed that, by natural justice, the toleration of foreign corporations depended on formally assured reciprocity of treatment. Some Latin-American authors maintain that the theoretically equal position conceded to foreigners implies their complete subjection to all domestic laws. Such theories have been but a poor screen for economic and social, if not mere power, policies. The requirement of

<sup>213</sup> See the history of recent efforts in Hudson, 7 Int. Legislation 355.

<sup>214</sup> League of Nations Publ., C.36.M.21.1929.II., p. 16; C.97.M.23.1930.II.; Revue 1930, 236. Cf. KUHN, Am. J. Int. Law 1930, 570. Opposition was raised from several states, and the full conference of 47 states has not discussed the committee draft.

governmental authorization or treaty privilege has been established either as a means for the government to bolster its power of domination or bargaining, or in the belief that national autarchy was needed, or that a firm protection of the national resources and labor was necessary. On the other hand, the theory of freely admitting foreign juristic persons has derived from credence in the usefulness of the capitalistic system and of the broadest exchange of goods and services. The methods of thinking have alternated in the periods of modern industrialism and have contended with each other in most countries. It would seem, at last, that the real problem, the contrast of interests, has made itself acutely felt, particularly in the historic relation between the highly equipped corporations of the United States and Latin-American countries rich in raw materials and labor, but wanting capital and skilled management. There may have occurred errors and abuses on both sides, and there exists also a natural opposition of interests. But if we hear in this country the industrial leaders profess that the times of colonial exploitation have gone forever, that it is an American interest to raise foreign wages and help foreign production and that investing countries should send their capital as private capital rather than as an arm of nationalized economic aggression,<sup>215</sup> the clash of real interests would seem easily dissolvable.

2. We have found recognition of foreign corporations made dependent in some jurisdictions on reciprocity, in others on general or special authorization or on registration requiring sometimes very exacting documentation. The right to sue in a state court is characteristically included in the effects thus conditioned. (Chapter 22). Even though foreign organizations may be recognized with some effects, their permission to do business, in a number of states, is granted only according

<sup>215</sup> See, for instance, ERIC JOHNSTON, "America's World Chance," in *Reader's Digest*, June 1945, 5.

to the pleasure of the government. In not a few states, they are subjected to an unlimited amount of domestic law, with respect either to their constitution or to their affairs out of the state, or to both. If the statutory requirements concerning authorization of business or registration of the company's place of business, its agents, balances, and often many other items, are not observed, contracts made in the state may be declared void, or the other party may enjoy the option, according to his advantage, of regarding the contract as valid or invalid, and frequently the right to sue on the contract may be denied to the company. (Chapter 23).

The harshness of legislative requirements in certain parts of the world is surpassed by vexatious bureaucratic procedures, abuses, and the necessity of personal connections, if not bribery. Of one state, Panama, which might have been expected to understand the need of peaceful collaboration, an excellent author has recently collected a long list of difficulties wantonly created for foreign corporations, such as the obscure definition of business requiring registration, exaggerated requirements for registration of powers of the prescribed general agent and for the proof of corporate existence, potential danger that nonregistered companies that have no business place or habitual business are not allowed to sue in the courts, taxation policies deliberately intended to close the country to capital unless it submits to complete domination, and so forth.<sup>216</sup>

Some hostility, with uncertainty as to the law, has also appeared in this country. A complaint of uncertainty has been raised, for instance, with respect to the nature of the refusal to allow suit, in the Pennsylvania Annotations to the Restatement.<sup>217</sup> A New York attorney once wrote in *Clunet's Journal* for the information of European readers that the difficulties

<sup>216</sup> EDER, 15 Tul. L. Rev. (1941) 521. With respect to powers of attorney, see *supra* n. 115.

<sup>217</sup> Restatement, Pennsylvania Annotations 77.

of security for costs, of standing in court, and of acquiring immovables in New York made it inopportune for a foreign corporation to do business there otherwise than by creating a local affiliate.<sup>218</sup>

3. In view of the various circumstances of countries as well as of corporate purposes, a uniform regulation may not be possible or even desirable. However, an average pattern of normal relations can well be envisaged. If a state has no reason for intensified control such as is justified over public utilities, finance and insurance enterprises, it should cooperate with the world and limit its supervision to the really necessary measures. Corporations created in one country, particularly if their central management is also located there, should be fully recognized, without petty obstacles, throughout the world as persons capable of acting in transactions and law suits. Normative regulation may be imposed on the habitual business of a foreign corporation rather than on the corporation itself. If qualifying to do business is made relatively easy as in the United States, due to the professional services of special companies for the filing of applications, and to the moderate fees imposed by the states, this method of control is not objectionable. Also, a foreign organization entering the life of a national economy by deploying commercial or industrial activities, has naturally to obey the local laws and decrees destined to govern such activities. They include fiscal, jurisdictional, and administrative laws, and above all the laws concerning health, labor, and social security, but exclude the legal provisions concerning the creation and internal organization of corporations. Nor should domestic private law without qualification be extended to all contracts made in the state; what law governs these is to be determined by conflicts rules following entirely different lines of policy.

Legitimate interests of a state are involved in safeguarding

<sup>218</sup> LOEB, *Clunet* 1910, 96.

the interests of its citizens dealing with foreign enterprises that have an establishment in the state. It is a perfectly sound policy to require that the legal capacity of a foreign organization permitted to carry on business in the territory and its locally pertinent economic situation be made recognizable to the individuals coming in contact with it either as employees or as third parties. Acts of publication for this purpose are prescribed almost everywhere, sometimes not sufficiently but more often with exaggeration. The proper effect of registration is well expressed in an Italian decision. Although a foreign corporation may be dissolved by appropriate proceedings at its seat, this dissolution cannot be opposed to a third party in the country, unless it has been publicized according to the domestic law.<sup>219</sup> But it is crude, almost barbaric law, under any circumstances, to refuse foreign legal persons access to the courts or to deny the validity of their contracts.

A borderline problem is raised by the statute of New York imposing liability on the officers, directors, and stockholders of a foreign stock corporation transacting business in the state, among other things, for unauthorized dividends and unlawful loans to stockholders.<sup>220</sup> Not only is jurisdiction taken, but the liability is authoritatively construed as an offense against the New York prescriptions rather than against those of the charter law.<sup>221</sup> This protection of creditors exceeds the normal scope of domestic law as traced in the Restatement.<sup>222</sup> It may be regarded, however, as a control measure defensible in the biggest financial center of the world, which would not be justifiable everywhere. Whether

<sup>219</sup> Cass. Ital. (July 13, 1936) *Moulenet v. D'Amico*, *Foro Ital. Rep.* 1936, 1752 Nos. 555-556.

<sup>220</sup> Stock Corporation Law of 1939, § 114, derived from the Law of 1890, c. 564 § 60, as added by L. of 1897, c. 384 § 4.

<sup>221</sup> *German-American Coffee Co. v. Diehl* (1915) 216 N. Y. 57, 109 N. E. 875.

<sup>222</sup> Restatement, New York Annotations 157 § 188. The courts of New York emphasize this exception to the law of the state of incorporation which is applied whenever the statutes do not expressly extend their domain to foreign corporations. Exceptions are provided in addition to § 114 of the Stock Cor-

rules in the interest of creditors extend to foreign corporations, such as those prohibiting purchase of their own stock out of the capital, seems an unsettled question also in New York.<sup>223</sup>

That domestic share- or bond holders should be protected by special measures, only because the company does business in the state, goes certainly too far. Nor does acquisition of securities by local investors need any particular legal favor. German judges deciding on the registration of foreign companies have conveniently investigated into the amount of the capital stock and its sufficiency for a minimum standard of trustworthiness for creditors, but have refrained from any regard for the organization and the rights and interests of shareholders.<sup>224</sup>

Finally, no objection can be made to the exaction by certain states of a reasonable compensation from foreign enterprises which they admit, as an additional burden on capital profit leaving the country. From this angle, discriminatory taxation can be vindicated, while overtaxation in order to lower the competitive strength of foreign capital is a measure of economic warfare rather than a policy of neighbors.

That these are the basic lines of a satisfactory compromise must have been felt in many quarters. It is the more regrettable that not one of all the positive enactments is entirely commendable, and that, to my knowledge, not much has been done even in legal and economic science to develop the particulars. The elaboration of a comprehensive model statute for foreign organizations would be a worthy object of international endeavor.

poration Law by § 222 of the General Corporation Law, but not with respect to §§ 71-73 of the Stock Corporation Law; *Bogardus v. Fitzpatrick* (1931) 139 Misc. 533, 247 N. Y. Supp. 692; *Armstrong v. Dyer and Hobby* (1935) 268 N. Y. 671, 198 N. E. 551; *Gonzales v. Tuttmann* (1945) 59 F. Supp. 858, 862 (stockholders' liability to laborers, servants, and employees).

<sup>223</sup> The question was left undecided in *Hayman v. Morris* (S. Ct., N. Y. County, 1942) 36 N. Y. Supp. (2d) 756.

<sup>224</sup> *HACHENBURG* in 3 *Düringer-Hachenburg* (1934) § 201, ns. 40-46.

# PART SEVEN

## TORTS

In this part, the following books and articles will be cited in abbreviated form:

Common law: Hancock, *Torts in the Conflict of Laws* (1942); Lorenzen, "Tort Liability and the Conflict of Laws," 47 *Law Q. Rev.* (1931) 483, with comparative research; Goodrich, "Tort Obligations and the Conflicts of Laws," 73 *U. of Pa. L. Rev.* (1924) 19 (a chapter of his handbook); Stumberg, "Conflict of Laws-Torts-Texas Decisions," 9 *Texas L. Rev.* (1932) 21; Cook, "Tort Liability and the Conflict of Laws," 35 *Col. L. Rev.* (1935) 202 and *Logical and Legal Bases of the Conflict of Laws* (1942) 311, mainly concerned with polemics.

Henri Mazeau, "Conflits de lois et compétence internationale dans le domaine de la responsabilité civile délictuelle et quasi-délictuelle," *Revue Crit.* 1934, 377; von Schelling, "Unerlaubte Handlungen," 3 *Z.ausl.PR.* (1929) 854.

For comparative substantive law, see Rabel, "Die Grundzüge des Rechts der unerlaubten Handlungen," in *Sonderheft*, 6 *Z.ausl.PR.* (1932) 10; ten articles on "Haftung" in 4 *Rechtsvergl. Handwörterbuch* 43-113; Titze, "Unerlaubte Handlungen," in 6 *Rechtsvergl. Handwörterbuch* 676.



## CHAPTER 24

# The Principle

### I. THE MEANING OF TORT

#### 1. Delict and Quasi Delict

THE conflicts rules applicable to torts have been developed mostly with respect to *delicts*, viz., torts committed *by fault*, that is, intentionally or negligently.<sup>1</sup> The expression *lex loci delicti commissi* is still used to denote the principle that refers to the law of the place where the alleged tort occurs. However, in modern legislation, the separate position of liability *quasi ex delicto*—of “*quasi delicts*”—is practically abolished,<sup>2</sup> and accordingly by universal understanding, this conflicts rule at present covers any unlawful conduct *without fault* generating liability.<sup>3</sup>

<sup>1</sup> See, for instance, Código Bustamante, art. 168.

<sup>2</sup> TITZE, 6 Rechtsvergl. Handwörterbuch 678ff.

In a part of the French literature, *quasi-délit* is understood to mean liability for negligence, but such terms are ordinarily used to denote liability without fault, as by POLLOCK, Torts (ed. 13) 17.

<sup>3</sup> Restatement § 379 (c) comment f; Le Forest v. Tolman (1875) 117 Mass. 109; Young v. Masci (1933) 289 U. S. 253, 53 S. Ct. 599.

England: Walpole v. Can. Northern R. Co., Privy C. [1923] A. C. 113, 120.

Austria: GlU. NF. 7252 (automobile); 3469, 5219, cf. 3439 (railroad); 6511 (fraud).

Belgium: POULLET § 317; Trib. Arlon (July 13, 1904) Revue 1905, 539 and (July 20, 1904) *id.* 543; Cass. (Feb. 21, 1907) and (Nov. 26, 1908) Revue 1909, 952, the latter decision also in Clunet 1909, 1178.

France: PILLET, 2 Traité § 549; WEISS, 4 Traité 415; NIBOYET 616 § 490; ARMINJON, 2 Précis 278.

Germany: RG. (June 14, 1915) Leipz.Z. 1915, 1443 No. 16; RG. (Feb. 25, 1904) 57 RGZ. 145; OLG. Karlsruhe (Oct. 28, 1931) IPRspr. 1932 No. 41.

Italy: Disp. Prel. (1942) art. 25 par. 2, and previously 3 FIORE § 1262ff.; DIENA, 2 Princ. 266; CERETI, Obblig. 195; Cass. Torino (Dec. 19, 1911) Riv. Dir. Com. 1912 II 177.

Spain: LASALA LLANAS 365.

Sweden: S. Ct. (Sept. 20, 1933) NJA. 1933, 364, see 7 Z.ausl.PR. (1933) 931.

Switzerland: BG. (Sept. 10, 1925) 51 BGE. II 327.

This liability is based on the idea that a person who conducts for his own benefit a business subjecting other persons to possible loss, should bear the risk of the damage as a part of his business costs. In the terms of the civil law doctrine,<sup>4</sup> it is a liability *for risk* (*Gefährdungshaftung*, *responsabilité pour risque*). Among the classes of persons frequently subject to such liability, we find the owners or keepers of animals, vessels, railroads, motor vehicles, aircraft, houses, inns, laboratories, et cetera. Thus assimilated to delictual obligations, obligations to pay damages irrespective of fault, when imposed by the state of the place where the act is done, are enforced outside this state. In fact, the liability for risk, whether based on the mere fact that the defendant has caused the damage or on a presumption of his fault, cannot be reasonably subjected to a conflicts rule entirely different from that selected for liability based on the proved fault of the defendant. The policies pursued in the national laws by all these various tort rules are too closely related to permit divergent determination of the applicable law.

The scope of the conflicts rule ought even to include in addition certain liabilities without fault attending acts that, although damaging to the interests of other persons, are permitted on account of the superior interests of the actor, acts, which, therefore, are termed lawful only in a formal or restricted sense.<sup>5</sup> For instance, it is formally lawful to effect an arrest or seizure on the mere probability of a claim, but the claimant will be liable, if in a subsequent suit he is shown to have known or negligently failed to ascertain that his claim did not exist or, as frequently enacted, even merely because

<sup>4</sup> Basic: JOSEPH UNGER, *Handeln auf eigene Gefahr* (ed. 2, 1893); *id.*, *Handeln auf fremde Gefahr* (1894); MATAJA, *Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie* (1888); for the modern literature see MÜLLER-ERZBACH, "Ersatz durch Gefährdungshaftung und Gefahrtragung," 106 *Arch. Civ. Prax.* (1910) 309.

For common law, see *infra* p. 274 n. 87.

<sup>5</sup> TITZE, 6 *Rechtsvergl. Handwörterbuch* 680; ENNECCERUS-KIPP-WOLFF, *Allg. Teil* § 199.

he had no actual claim. Here again liability is based on the idea of acting at the actor's own peril, although the damaging act is permitted by the law. Arrest and seizure have been subjected, therefore, to the law of the court that grants them provisionally.<sup>6</sup>

It is true that the differences between the laws of the various countries are greater with respect to liability for risk than with respect to liability for intentional or negligent harm. For a while in the past, radical tendencies swung to extreme elimination of the principle of fault. A few recent drafts and codes, including the Soviet Code, have conferred on the victim of fortuitous damage a claim for indemnification to an equitable extent,<sup>7</sup> and the Mexican Civil Code imposes a presumption of fault on any person who:

Makes use of mechanisms, instruments, apparatus or substances dangerous in themselves, or in the velocity they deploy, in their explosive or inflammable nature, in the energy of the electric current conducted or for any other analogous causes. . . .<sup>8</sup>

At times, judges of more conservative jurisdictions may hesitate to apply such a foreign extracontractual liability based upon the mere fact of keeping a dog or carrying on an industrial enterprise, owning a house, or granting a third person the use of a car.<sup>9</sup> The way to overcome such doubts has been shown in the following classical reasoning of Judge Learned Hand:

"There is nothing inherent or antecedently necessary in

<sup>6</sup> Germany: RG. (Sept. 20, 1882) 7 RGZ. 378; 2 BAR 396.

Switzerland: App. Zürich, 11 HE. 197, cited by 2 MEILI 96.

<sup>7</sup> Soviet Russian Civil Code, art. 406; Hungarian Draft, C. C. (1914) § 1486; *id.* (1928) § 1737; also the second draft of the German BGB. § 752 contained such rule.

<sup>8</sup> Mexico: C. C. (1928) art. 1913.

<sup>9</sup> Characteristically, BARTIN, 2 Principes 410ff., 433, as late as 1932, tries to explain the liabilities for risk as diverted liabilities for fault, and confesses embarrassment where his effort fails.

the conventional limitation of liability to such consequences as may be anticipated by ordinary foresight, within which limits the law of the state where the damage occurs concededly controls. No such limitation existed in ancient times, and the law is abandoning it in field after field; fault is by no means an inevitable condition of liability. Provided that the result be not too distasteful to the *mores* of the forum, we think that the state where the damage occurs may impute liability to one outside, if he be in fact the voluntary author of it. . . ."<sup>10</sup>

Some statutory provisions, apparently or really, go even farther, by subjecting all "extracontractual" claims to the law of the place where the act in question has been done.<sup>11</sup> This would include all causes of action claimed to arise out of formally and substantially *lawful* acts, such as, on the one hand, the so-called quasi contracts—e.g., *negotiorum gestio*, unjust enrichment, constructive trust—and on the other hand, destruction of private property for public use, if connected with the duty of compensation, and the like. All these cases must be reserved for discussion separate from torts and contracts.

## 2. Characterization of Tort

How do we determine the meaning of the term "tort" in the conflicts rule referring "tort" to the law of the place where the act alleged to be tortious has been done?

If the usual doctrine of characterization according to the law of the forum is taken literally, an act done abroad cannot support a claim for liability, except where it is an actionable tort also by the internal private law of the forum. This, in fact, is the British, Japanese, and Chinese approach (soon to

<sup>10</sup> *Scheer v. Rockne Motors Corp.* (1934) 68 F. (2d) 942 at 944.

<sup>11</sup> Belgian Congo: C. C. art. 11 par. 3.

Italy: C. C. (1942) Disp. Prel. art. 25 par. 2.

Poland: Int. Priv. Law, art. 11 No. 1.

Treaty of Montevideo on International Civil Law of 1889, art. 38: place where the licit or illicit act has been done.

be discussed), but it has been very decidedly rejected in all other countries. Moreover, the extension of the conflicts rule on tort so as to include foreign liabilities for risk is not compatible with this view.

To escape these obvious inconsistencies, the advocates of the *lex fori* are prepared to recognize any foreign type of liability that would be classified as tort if it were ordained by the domestic statutes of the forum.<sup>12</sup> This idea has some significance but in reality points to systematic problems beyond the domain of the internal law.

In consideration of the impossible consequences of the *lex fori* theory, the opposite theory of characterization according to the law referred to, has had more followers in this special field than generally.<sup>13</sup> In this view, the commonly used conflicts rule refers to the law of the place where an act is done to decide whether it is a tort, and no limitation is added. The result would seem acceptable in most cases. But no easy solution is afforded by this method where the positive laws disagree in characterizing certain obligations, as the duty to support illegitimate children or the liability for breach of promise to marry, which are based on tort in one country and on entirely different theories in others. In these cases, it does not help to say that "the predominance of the territorial law is justified only insofar as one is in the presence of an obligation of tortious character."<sup>14</sup>

Once more resorting to comparative law, we have to form a category of tort broad enough to embrace all definitions that may be given to the term on the basis of a conscientious general system of law. Actually or virtually, this concept underlies the thinking of lawyers, not only in civil law countries but also in England and the United States.

We do not touch hereby, of course, the great controversy,

<sup>12</sup> RAAPE 208, and D. IPR. 325 III.

<sup>13</sup> POULLET 355; WALKER 523.

<sup>14</sup> PILLET, 2 Traité 313.

pending for a long time in the English literature, which concerns the existence of a general liability that would overshadow the historical separate categories of tort,<sup>15</sup> such as assault, trespass, conversion, nuisance, defamation, etc. However this problem may be solved, it has become common ground that, by inductive generalization from the recognized separate types of peculiar tort liabilities, principles of tort can be formulated.<sup>16</sup> This is quite enough to reach the doctrinal state of German private law. Neither system imposes by a general rule liability for all negligent conduct. Nevertheless, the provisions given in the Civil Code for a number of important types of tort serve as a subsidiary regulation for tort actions established in special laws, including liabilities without fault.<sup>17</sup> The general rules of tort thus achieved, though more compact, are comparable to what may be called principles of tort in England, and still more so to the American doctrine.

On the other hand, the French Civil Code has formulated its famous principle of responsibility for fault—the product of the European pandectistic practice and itself the model of innumerable codes—in the broadest terms, too broad in fact for the purpose of municipal law. Article 1382 of the French Civil Code reads as follows:

Any act whatever done by a man, which causes damage to another, obliges him by whose fault the damage was caused to repair it.

This definition has been narrowed by common opinion as well as in more modern reproductions in other countries, such as article 41 of the Swiss Code of Obligations. The conduct must not only be tainted by fault but unlawful. In the prevailing conception of modern continental lawyers, be-

<sup>15</sup> See G. W. WILLIAMS, "The Foundation of Tortious Liability," in 7 *Cambr. L. J.* (1941) 111.

<sup>16</sup> SEAVEY, "Principles of Tort," 56 *Harv. L. Rev.* (1943) 72.

<sup>17</sup> 67 RGZ. 144, *cf.* 122 RGZ. 326.

havior is unlawful, if it is prohibited by the rules establishing general duties for the protection of individual interests or the interests of the community. In this view, breach of contract, at least by the debtor himself, is not "unlawful" in itself, since it is the violation of a relation between two persons rather than of a duty incumbent on every one. With this supplement, the concept holds true as a basic definition of tort in comparative consideration of any municipal system, special types as established in the various laws being defined by additional requirements.

The only concept of delict, useful on an international scale to the prevailing conflicts rule, is identical. It is equally easy to extend this concept to responsibility for risk. "Tort," thus, in the meaning of the conflicts rule, is any unlawful invasion of the interests of another person, causing damage or harm to a person. The conflicts rule, of course, will predicate what system of law shall determine these elements.

It is immaterial on what basis the law of the forum establishes the protected sphere, whether as property, status, or bodily integrity, and which unlawful invasions it recognizes as ground for actions or injunctions.

It is submitted that in practice the courts apply this very concept.<sup>18</sup>

## II. THE PRINCIPLE

### 1. The Dominant Principle

The principle unanimously established by the canonists and later the statistes since the 13th century<sup>19</sup> and generally adopted today is that the *lex loci delicti commissi* governs.<sup>20</sup> This predicates that the law of the place where an alleged

<sup>18</sup> See RG. (March 12, 1906) JW. 1906, 297; 23 ROLG. 14 and RABEL, 3 Z.ausl.PR. (1929) 755; NEUNER, Der Sinn 105.

<sup>19</sup> See NEUMEYER, Gemeinrechtliche Entwicklung 138ff; 2 BAR 115; 2 MEILI 90.

<sup>20</sup> Mr. Justice Holmes in *Cuba R. Co. v. Crosby* (1912) 222 U. S. 473, 477, and in *Western Union Telegraph Co. v. Brown* (1914) 234 U. S. 542, 34 S. Ct.

tortious act in the broad meaning described above has been done, determines whether, under what conditions, to what extent, and with what consequences, this act constitutes a cause of action.

955; *Walsh v. New York & New England R. Co.* (1894) 160 Mass. 571, 36 N. E. 584; 2 BEALE 1289; GOODRICH § 89; LORENZEN, 6 Répert. 325; Re-statement §§ 378, 379, 381, 383, 384, 385, 386, 390.

Austria: OGH. (Nov. 2, 1910) 13 GIU. NF. 5219; (July 2, 1913) 16 GIU. NF. No. 6511.

Belgium: Cass (Feb. 21, 1907) Pasicrisie 1907.1.135; (Nov. 26, 1908) *id.* 1909.1.25.

Belgian Congo: C. C. art. 11 par. 3.

Brazil: See ESPINOLA, 8 Tratado 478.

Czechoslovakia: Draft (1931) § 14.

Denmark: Trib. Marit. Copenhagen (May 31, 1905) Clunet 1909, 1184; BORUM and MEYER, 6 Répert. 224 No. 85.

France: Cass. (req.) (Feb. 24, 1936) S.1936.1.161, first formal confirmation of the rule (see BATIFFOL, Revue 1937, 441) which was certain; however, see Cass. (req.) (Feb. 15, 1905) S.1905.1.209; Cass. (civ.) (May 16, 1888) S.1891.1.509.

French Morocco: Dahir of 11-13 August, 1913, art. 16.

Germany: EG. BGB. art. 12 (implicitly); formerly common practice, starting from OLG. München (Dec. 1, 1829), 1 Seuff. Arch. No. 153; see in particular ROHG. (Jan. 19, 1878) 23 ROHGE. 174; RG. (Sept. 23, 1887) 19 RGZ. 382; and constant practice.

Greece: C. C. (1940) art. 31.

Hungary: Curia, Nos. 7674 (of 1905), 9016 (of 1926); see SCHWARTZ, 40 Z.int.R. 206; SZASZY, 11 Z.ausl.PR. (1937) 172; Curia, (Oct. 27, 1937) 5 Z. Osteurop. R. (1939) 396.

Italy: C. C. Disp. Gen. (1942) art. 25 par. 2; the rule was recognized before, although it was controversial whether it was included in art. 9 par. 2, Disp. Prel. of 1865, see FEDOZZI 759; Cass. (July 19, 1938) Foro Ital. 1938 I 1216.

The Netherlands: Rb. Utrecht (Feb. 4, 1927) W. 11675, N.J. (1927) 991; Rb. Amsterdam (June 22, 1931) N. J. (1932) 325; VAN HASSELT 305.

Norway: S. Ct. Christiania (Dec. 15, 1905) Clunet 1907, 852.

Poland: Int. Priv. Law, art. 11.

Portugal: C. Com. art. 674 (as to collisions); CUNHA GONÇALVES, 1 Direito Civil 670.

Scotland: The rule seems certain, although the courts still have difficulties in ascertaining their own jurisdiction. See Dalziel v. Coulthurst, Executors (1934) S. C. 566.

Sweden: S. Ct. (Sept. 20, 1933) 7 Z.ausl.PR. (1933) 931; (Dec. 2, 1935) 10 *id.* (1936) 624.

Switzerland: 22 BGE. 486 and 1170; 35 *id.* II 480; 43 *id.* II 315; 51 *id.* II 328; 66 *id.* II 167.

Montenegro: C. C. art. 793.

Treaty of Montevideo on International Civil Law (1889) art. 38; (1940) art. 43.

Código Bustamante, arts. 167, 168.



2. *Lex Fori*

Against the dominant rule, in the early half of the nineteenth century, Waechter and Savigny advanced the opinion that tort problems should always be governed by the law of the forum.<sup>21</sup> They both believed that the tort rules of the various municipal laws were of such an ethical and imperative nature that no country would ever apply the tort rule of another country, especially when it does not consider the act unlawful. This thesis, formed in too close relationship with ideas current in penal law, has sometimes influenced courts in England,<sup>22</sup> Spain,<sup>23</sup> and elsewhere.<sup>24</sup> In Greece, it was repealed only by the Civil Code of 1940,<sup>25</sup> and a recent French writer has attempted to revive it.<sup>26</sup> Soviet Russia has no fixed rule, but most writers seem to agree that application of Soviet Russian law even to acts done abroad suits the spirit of Soviet law.<sup>27</sup>

## 3. Rule of Similarity

The idea that a "foreign tort" could be sued on without regard to the internal law of the forum has encountered opposition in the conception that in every case the foreign municipal law should be substantially similar to the law of the forum.

*American cases.* This view has been held in a number of

<sup>21</sup> WAECHTER, 25 Arch. Civ. Prax. (1842) 392; SAVIGNY (tr. Guthrie) 217 § 371, cf. 253 § 374; their opinion was followed by some now obsolete German decisions: 9 Seuff. Arch. No. 1, 11 Seuff. Arch. No. 3; 25 Seuff. Arch. No. 115; in partial sympathy with the *lex fori* theory, ROLIN, 1 Principes §§ 363-365.

<sup>22</sup> See CHESHIRE's (297) résumé of the case of *The Halley*.

<sup>23</sup> See the case history by LASALA LLANAS 365, where he has difficulty in reaching the dominant opinion.

<sup>24</sup> France: Cass. (req.) (May 29, 1894) S.1894.1.481.

Italy: App. Milano (July 8, 1925) Rivista 1926, 125. *Contra*: DE SANCTIS, *id.* 127; FEDOZZI 758; SCHNITZER 289 n. 1.

<sup>25</sup> Greece: C. C. (1856) art. 6; cf. 2 STREIT-VALLINDAS 260; C. C. (1940) art. 31.

<sup>26</sup> HENRY MAZEAUD, *Revue Crit.* 1934, 377; PRUDHOMME, *Clunet* 1936, 626.

<sup>27</sup> MAKAROV, *Précis* 305 and authors cited.

American cases involving foreign death statutes. Such statutes have been introduced in practically all jurisdictions in the United States to abolish the common law rule that "*actio personalis moritur cum persona*," that is, that an action for injury to a person cannot be maintained after his death by the deceased man's heirs. As the statutes vary in many details, extraterritorial application is important. But originally they were considered to create a new right on the ground of wrongful death rather than on that of a precedent tortious invasion of the body, and were construed as penal statutes, inapplicable in other states. It was a progressive step to apply them where there were similar domestic statutes.<sup>28</sup> The entire peculiar conception was forcefully refuted by the Court of Appeals of New York in *Loucks v. Standard Oil Co. of New York*.<sup>29</sup> Although the rule was followed as late as in 1931 and 1936 in Maryland,<sup>30</sup> and has not yet been expressly overruled in Texas,<sup>31</sup> American law as a whole may be claimed, at present, to agree with civil law in submitting injuries ending in death, like all others, exclusively to the statute of the place of wrong.<sup>32</sup>

*British rules.* A famous double rule is generally regarded as governing tort problems in England, in a formula repro-

<sup>28</sup> GOODRICH, 73 U. of Pa. L. Rev. (1924) 19, 28; HANCOCK, Torts 21-29; Texas & P. R. Co. v. Richards (1887) 68 Texas 375, 4 S. W. 627 and other Texas cases. See also STUMBERG, 9 Tex. L. Rev. (1931) at 29; furthermore, Wooden v. Western New York and Pennsylvania R. Co. (1891) 126 N. Y. 10, 26 N. E. 1050, cf. STUMBERG, *id.* 163.

<sup>29</sup> (1918) 224 N. Y. 99, 120 N. E. 198; see also Powell v. Great Northern R. Co. (1907) 102 Minn. 448, 113 N. W. 1017.

<sup>30</sup> London Guarantee & Accident Co. v. Balgowan S. S. Co. (1931) 161 Md. 145, 155 Atl. 334, 77 A. L. R. 1302; Davis v. Ruzicka (1936) 170 Md. 112. Cf. 155 F. (2d) 67 n. 3.

<sup>31</sup> El Paso & Juarez Traction Co. v. Carruth (Tex. 1923) 255 S. W. 159, declaring Mexican law substantially dissimilar. No recent case has treated the law of a state of the United States likewise. The theory has been confirmed despite art. 4678, Rev. Civ. Stat. (1925) in Wells v. Irwin (1942) 43 F. Supp. 212, 214. See STUMBERG, 9 Tex. L. Rev. (1931) 21, Texas Annotations to the Restatement (1936) § 384.

On a California case see *infra* pp. 249 f. (public policy).

<sup>32</sup> Restatement §§ 381-392. The contrary statement in 11 Am. Jur. 496 § 184 seems to be founded on antiquated cases.

ducing a passage of the opinion of Willes, J., in *Phillips v. Eyre*:

"As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."<sup>33</sup>

Independently of the meaning Willes, J., himself clothed in these words,<sup>34</sup> they have become a rigid rule of secure, though very unhappy, standing.

The second part of this rule has an old history. In its oldest phase, this rule was intended to excuse a defendant who would be liable to damages under English law—for seizure<sup>35</sup> or capture of a ship,<sup>36</sup> detention<sup>37</sup> or arrest<sup>38</sup> of a man—in view of the lawfulness of such act in the instant case as done under a foreign sovereign. Thus far, the English rule aims at the same result as the prevailing rule that makes the local law of the place of wrong alone decisive. However, by strange complications the English judges arrived at the idea that the law of the place of wrong controls only the "justi-

<sup>33</sup> (1870) Q. B. 1 at 27; Lord Macnaghten in *Carr v. Francis* Times & Co. [1902] A. C. 176, 182.

<sup>34</sup> HESSEL E. YNTEMA suggests the possibility that "The celebrated two rules are an effort to formulate—as the event has shown, an unhappy one—the theory that 'a right of action,' as well as the obligation, is 'the creature of the law of the place and subordinate thereto.' The first rule might thus be regarded as an expression of the truism that the case must be one of which the court of suit will take jurisdiction, a construction to which the immediately preceding observation, in the opinion, instancing the local nature of actions for trespass to land, that English courts do not undertake 'universal jurisdiction' over foreign transactions, lends countenance. This supposes that Willes, J., did not intend to suggest that the *lex fori* is the primary measure of the existence of either the 'obligation' or the 'right of action.' In subsequent cases, the two rules have come to exercise an autonomous and unwarranted fascination, eclipsing the more detailed analysis that formed their context. Which, if so, would serve to remind us of the great dangers inherent in formulae as a means of transmitting doctrine."

<sup>35</sup> *Blad's Case* (1673) 3 Swan. 603, *Blad v. Bamfield* (1674) 3 Swan. 604.

<sup>36</sup> *Dobree v. Napier* (1836) 2 Bing. N. C. 781.

<sup>37</sup> *Regina v. Lesley* (1860) Bell C. C. 220, 233.

<sup>38</sup> *Carr v. Francis* Times & Co. [1902] A. C. 176.

fiability" of the act. They did not ask whether it was a tort entailing damages at that place. The case definitively causing this deviation from the world-rule was *Machado v. Fontes*.<sup>39</sup> A libel published in Brazil injured the plaintiff. The defendant seemed to raise in objection the absence of a civil action for damages in the case of a libel under Brazilian law and requested inquiry into that law by a commission to be sent to Brazil. The Court of Appeals reasoned in the following way: A libel certainly was a criminal offence also in Brazil, hence not "justifiable." Even if no action for damages ensued there, it had to be granted according to English law. It should be conceded that the judges felt strongly the inequity of dismissing the action, under such extraordinary circumstances.<sup>40</sup> It has been suggested, therefore, that the court should have contented itself with an exceptional ruling on the basis of stringent public policy;<sup>41</sup> this, in fact, would have prevented the crystallization of a rule that generally substitutes the law of the forum for that of the place of wrong. However, the court and its numerous critics would have done still better by examining the assumption of the "unusual,"<sup>42</sup> nay fantastic, legal situation ascribed to Brazilian law. There was a double ground for not denying a civil action for damages on the ground of a punishable act in Brazil. On the one hand, the general liability for fault, embodied in the French Civil Code, article 1382, adopted in the Portuguese Civil Code of 1867, articles 2361 and 2362, which now appears in the Brazilian Civil Code of 1916,<sup>43</sup> was recognized in all drafts<sup>44</sup> and no doubt was a living rule. On the

<sup>39</sup> [1897] 2 Q.B. 231.

<sup>40</sup> GUTTERIDGE, review of CHESHIRE, 55 Law Q. Rev. (1939) 131.

<sup>41</sup> ROBERTSON, "The Choice of Law for Tort Liability in the Conflict of Laws," 4 Modern L. Rev. (1940) 27.

<sup>42</sup> HANCOCK, Torts 17, 121.

<sup>43</sup> Brazil: C. C. art. 159 and for defamation, the special provision in art. 1547.

<sup>44</sup> See CARLOS AUGUSTO DE CARVALHO, *Direito Civil Brasileiro Re compilado ou Nova Consolidação das Leis Civis* (Rio de Janeiro 1899) 302 art. 1014.

other hand, the Penal Code of 1890, conforming to another French rule,<sup>45</sup> stated a duty of indemnification, as an effect of every final criminal condemnation.<sup>46</sup> Thus, the feeling of the English courts would have been shared by Brazilian lawyers. In this case, the helplessness of the court in regard to foreign law was to be blamed on the pleading, but it became consequential. In a later case in the Privy Council, the difficulties of workmen's compensation in Canadian provinces caused incidental argument to the effect that an accidental injury to a worker was "justifiable" as it was "neither actionable nor punishable," a manifest *lapsus linguae* in a case where the Privy Council in fact dismissed a claim that was not actionable by the *lex loci actus*.<sup>47</sup> Cheshire, in demonstrating this, has concluded that the second part of the rule in *Phillips v. Eyre* has been overruled and that the act must be *actionable* (also) under the law of the place of wrong.<sup>48</sup> The Scotch courts, in fact, have adopted the same view when they refuse to award "*solatium*" (satisfaction) for mental anguish in cases of wrongful accidents on English territory or vessels, despite the Scottish law.<sup>49</sup> The Canadian courts, however, follow the English rule and in constant practice, before granting damages for a foreign act, state that it is not justifiable where committed.<sup>50</sup>

<sup>45</sup> See M. S. AMOS and F. P. WALTON, *Introduction to French Law* (1935)

215.

<sup>46</sup> Penal Code, Decree No. 847, of Oct. 11, 1890, art. 69 (b), *cf.* BENTO DE FARIA, *Anotações ao Código Penal do Brasil* (ed. 4, 1929) 160; *cf.* art. 315 *et seq.* on "Calúnia e Injúria."

<sup>47</sup> *Walpole v. Canadian National R. Co.* [1921] 66 D. L. R. 127; [1923] A. C. 113, 70 D. L. R. 201.

<sup>48</sup> CHESHIRE 301ff.

<sup>49</sup> *Ld. Pres. Robertson in Kendrick v. Burnett* (1897) 25 R. 82; law of the flag applied, as interpreted by Lord Dundee in *Convery v. Lanarkshire Tramways* (1905) 8 F. 117; *Naftalin v. London, Midland & Scottish R. Co.* (1933) S. C. 259; See O'RIORDAN, "Choice of Law in Actions *ex Delicto* under Scots Law," in 4 *Modern L. Rev.* (1941) 214.

<sup>50</sup> S. Ct. of Canada: *O'Connor v. Wray* [1930] S. C. R. 231, [1930] 2 D. L. R. 899; *Howells v. Wilson* (C. A. 1936) 69 Que. K. B. 32.

The "first rule" of Willes, J., has been developed in the converse case of a defendant liable under the foreign law who would not be liable under English law if the facts had occurred in England. This doctrine also rests mainly on one decision, *The Halley*, 1868,<sup>51</sup> concerning the liability of a shipowner for negligence of a compulsory pilot in Belgian waters, a liability existing under Belgian but not under English maritime law. A perfectly analogous case of compulsory pilotage was decided by the German Reichsgericht in 1891 to the same effect,<sup>52</sup> both decisions being equally overridden by later events.<sup>53</sup> Yet while the latter court referred to public policy as the basis of an exceptional objection to the suit on the foreign tort, the Privy Council went to the length of asserting the principle that an English court of justice will not:

"Give a remedy in the shape of damages in respect of an act which according to its own principles, imposes no liability on the person from whom the damages are claimed."<sup>54</sup>

Since then, the formula demands that the tort be "actionable in England."<sup>55</sup>

The double rule with its twofold implication approaches unconditional application of the law of the forum, with a tempering proviso for the protection of a defendant whose act was "justifiable" at the place where done.<sup>56</sup> This rule is applied in Canada, far beyond the peculiar cases in which

<sup>51</sup> (1868) 2 L. R. P. C. 193.

<sup>52</sup> RG. (July 9, 1892) 29 RGZ. 93. The analogy was first pointed out by LORENZEN, 47 Law Q. Rev. (1931) 498 ns. 57, 62.

<sup>53</sup> *Infra* p. 276.

<sup>54</sup> L. J. Selwyn's dictum in *The Halley* at 204; repeated in *Machado v. Fontes* [1897] 2 Q. B. 231 by L. J. Lopes and L. J. Rigby.

<sup>55</sup> 2 WHARTON 1096; GOODRICH 230.

<sup>56</sup> FALCONBRIDGE, 17 Can. Bar Rev. (1939) 546, 549; 18 Can. Bar Rev. (1940) 308, 310. Even more definitely, M. WOLFF, Priv. Int. Law 494, 500 explains the double rule as restricting the *lex loci delicti* "to the question: is the act that caused the damage justifiable? All other questions must be answered by the (English) *lex fori*."

it originated, so as to prevent enforcement of claims not only arising in the United States but even in other Canadian provinces, when the laws involved "differ slightly from their own."<sup>57</sup> The Supreme Court of Canada has extended this unfortunate practice to Quebec, because in the Court's opinion no sufficient authority was cited for a prevailing more generous rule.<sup>58</sup> A recent application has afforded a true counterpart to *Machado v. Fontes*, even better substantiated in its facts. The Ontario Highway Traffic Act, 1937 (s. 27) makes careless driving punishable but (s. 47) denies civil relief to a gratuitous passenger of the car causing the accident. On this premise, the Canadian Supreme Court awarded damages to the victim on the ground of the tort law of Quebec *qua lex fori*, because the act was punishable, though not actionable at the place of wrong.<sup>59</sup> A remedy against the rule has been shown by the Supreme Court of Ontario. A gratuitous passenger injured in New York was granted relief according to New York law, on the thesis that the Ontario statute of 1930 which excludes such claim was devoid of extraterritorial application.<sup>60</sup>

A somewhat analogous conflicts rule has been adopted in the conflicts laws of Japan and China,<sup>61</sup> with the difference

<sup>57</sup> HANCOCK, Torts 89 n. 10.

<sup>58</sup> O'Connor v. Wray [1930] S. C. R. 231, [1930] 2 D. L. R. 899, as stated by Duff, C. J., in Canadian National S. S. Co. v. Watson [1939] S. C. R. 11, 13, [1939] 1 D. L. R. 273, 274, cf. FALCONBRIDGE, 18 Can. Bar Rev. (1940) 308. Howells v. Wilson (C. A. 1936) 69 Que. K. B. 32; cf. 3 JOHNSON 357. *Adde* Lieff v. Palmer (1937) 63 Que. K. B. 278, and next note.

<sup>59</sup> McLean v. Pettigrew (1944) [1945] S. C. R. 62, [1945] 2 D. L. R. 65, affirming Pettigrew v. McLean (1942) 48 R. L. (N. S.) 400. See comment by FALCONBRIDGE [1945] 2 D. L. R. 82, 23 Can. Bar Rev. (1945) 309. It is a curious case also inasmuch as the Court, through Tascherian, J., in a learned exposition adopts the doctrine of French writers that there is no such thing as a *contrat de bienfaisance*, which in this case would have given relief under the law of Quebec, *qua lex loci contractus*. The French, in fact, do recognize a liability for fault which could have been correctly used as quasi-contractual but not as quasi-delictual ground for damages.

<sup>60</sup> Curley v. Clifford [1941] 2 D. L. R. 729, [1941] O. W. N. 154.

<sup>61</sup> Japan: Int. Priv. Law, art. 11 par. 2; China: Int. Priv. Law, art. 25; 1 ZITELMANN 186, 187.

that both laws are clearly based on the foreign tort law and, by exception, exclude its application, if the act is "not unlawful" under the domestic law of the court.

#### 4. Harm Done in a Territory Not Belonging to Any Country

Apart from injuries occurring on board a vessel or aircraft, a topic to be discussed later, doubts have been expressed whether harm done in a territory without organized government, would be more appropriately subjected to the personal law of the alleged tortfeasor,<sup>62</sup> or to the law of the forum.<sup>63</sup> In those places of the Orient where the personal law determines jurisdiction, liability of the subjects of these powers is usually determined by their respective national laws.

### III. LIMITATIONS ON THE PRINCIPLE

Not so far-reaching as the emphasis laid on the law of the forum in the British, Japanese, and Chinese rules, the following exceptional rules have modified the main principle to the benefit of the law of the forum.

#### 1. Law Common to the Parties

In Latin countries, there is a tendency with respect to contracts to apply to two parties having the same nationality the law of their common country; it has sometimes found expression in the field of torts. According to this opinion, an act which is lawful under the *lex loci*, but unlawful under the national law of the parties, is held to constitute a tort by a court of the common country of the parties.<sup>64</sup> Some authors

<sup>62</sup> 2 FRANKENSTEIN 371; RAAPE 217, III; M. WOLFF, IPR. 103. *Contra*: GIESE, 29 Archiv des öffentlichen Rechts (N. F.) (1937) 310, 341; and for Norway, CHRISTIANSEN, 6 Répert. 579 No. 155.

<sup>63</sup> England: FOOTE 520.

France: 2 ARMINJON (ed. 2) 342, 348 §§ 120, 122.

*Contra*: 2 BAR 121: "a precarious way out of embarrassment."

<sup>64</sup> Belgium: Cass. (Nov. 26, 1908) Pasirisie 1909.1.25, Clunet 1909, 1178, Revue 1909, 951; cf. Ministère Public in Pasirisie 1909.1.27; ROLIN §§ 363ff.



have even gone so far as to advocate that the personal law common to the parties should be applied also by the courts of any other country where the case might come up for decision.<sup>65</sup> Others have limited the national law to quasi delicts.<sup>66</sup>

The proposition has been defeated in France where it originated and is rejected in most countries.<sup>67</sup> It is certainly unreasonable in all those cases where private liability is closely connected with the local administrative and insurance policies. These bind every one in the territory, as expressed for instance in the International Convention on Motor Traffic, providing that the driver is bound to observe the laws and regulations of the country where he travels.<sup>68</sup>

This seems also to be the general attitude of common law lawyers. It is true that once, in 1862, an English judge, Wightman, in a dictum stated that in an action brought by

France: Trib. civ. Strasbourg (Jan. 28, 1929) *Clunet* 1929, 1131.

Greece: App. Athens (1899) No. 885, *Clunet* 1904, 450.

Italy: Cass. Torino (Dec. 19, 1912) *Revue* 1913, 586; App. Milano (July 8, 1925) *Rivista* 1926, 125; 3 *FIORE* § 1266.

Switzerland: BG. (June 15, 1917) 43 *BGE*. II 309, at 317, "as an ancillary argument!"

<sup>65</sup> WEISS, 4 *Traité* 417 n. 1.

<sup>66</sup> 3 *FIORE* § 1266.

<sup>67</sup> E.g., Austria: OGH., *GIU. NF.* 47 No. 5219 (accident on an Austrian train having passed the border into Bavaria, German law).

Belgium: 8 *LAURENT* 25.

France: CRÉMIEU, 5 *Répert.* 491 No. 2: "out of question."

Germany: RG. (June 14, 1915) *Leipz. Z.* 1915, 1443 (automobile accident in Austria, of parties domiciled in Germany, Austrian law); RAAPE, D. IPR. 324. (A contrary view in 2 *FRANKENSTEIN* 375 is isolated.) Nevertheless, the National Socialist Decree of December 7, 1942, *RGBL.*, Part I, 706 provided that all extracontractual damages between German citizens should be governed by German law, wherever the act may be done.

Italy: Cass. Torino (Dec. 19, 1911) *Riv. Dir. Com.* 1912 II 177; 3 *FIORE* § 1264 and in *Clunet* 1900, 719; DE SANCTIS, *Rivista* 1926, 128; FEDOZZI 758.

Sweden: S. Ct. (Sept. 20, 1933) *NJA.* 1933, 364, see 7 *Z. ausl. Pr.* (1933) 931; (Dec. 2, 1935) *NJA.* 1935, 585, 10 *Z. ausl. Pr.* (1936) 624.

Switzerland: BG. (Oct. 30, 1940) 66 *BGE*. II 165 (implicit); SCHNITZER 289 n. 1.

<sup>68</sup> Paris Convention on Motor Traffic of April 24, 1926, art. 8, HUDSON, 3 *Int. Legislation* at 1865; Pan-American Convention, Washington, Oct. 6, 1930, art. 10, HUDSON, 5 *Int. Legislation* at 790.

a British subject against a British subject the common law should be applied if it was more favorable to the plaintiff than the law of the place of wrong.<sup>69</sup> This proposition seems never to have been followed in England<sup>70</sup> and there are numerous cases in the United States where it was not even taken into consideration, although the facts of the case might have invited its application.<sup>71</sup>

However, in a group of cases involving foreign-committed unfair competition, the German courts and writers have considered that common German nationality of both parties or rather their common German domicile, should determine the application of the more severe German law.<sup>72</sup> This specific problem is to be discussed in connection with the complex of violations of commercial property.<sup>73</sup>

## 2. Local Actions

In the common law jurisdictions of both the British Empire and the United States, actions involving determination of title to real estate are still regarded as "local actions," i.e., as actions which can only be pursued in the forum where the land is situated and which are always to be decided in accordance with the law of that place.<sup>74</sup> Prevailing English and American opinion has extended this rule to actions for trespass to land.<sup>75</sup> This historical residue of the English juris-

<sup>69</sup> *Scott v. Seymour* (1862) 1 H. & C. 219, Ex. Ch.

<sup>70</sup> Cf. *CHESHIRE* 304.

<sup>71</sup> *American Banana Co. v. United Fruit Co.* (1909) 213 U. S. 347, 29 S. Ct. 511; *Cuba R. Co. v. Crosby* (1912) 222 U. S. 473, 32 S. Ct. 132; *Fitzpatrick v. International R. Co.* (1929) 252 N. Y. 127, 169 N. E. 112; *Alabama, Great Southern R. Co. v. Carroll* (1892) 97 Ala. 126, 11 So. 803.

<sup>72</sup> 18 RGZ. 29; 55 *id.* 199, and others, see *infra* p. 297 n. 178.

<sup>73</sup> *Infra* pp. 295 ff.

<sup>74</sup> See *KUHN*, "Local and Transitory Actions in Private International Law (1918)," 66 U. of Pa. L. Rev. (1918) 301; *WHEATON*, "Nature of Actions—Local and Transitory (1922)," 16 Ill. L. Rev. (1922) 456; *WICKER*, "The Development of the Distinction Between Local and Transitory Actions (1926)," 4 Tenn. L. Rev. (1926) 55.

<sup>75</sup> Restatement §§ 614, 615; *British South Africa Co. v. Companhia de Moçambique* [1893] A. C. 602; *Livingston v. Jefferson* (1811) 15 Fed. Cas.

dictional doctrine has shocking results amounting to outright denial of justice<sup>76</sup> and has no counterpart anywhere outside the common law countries.

### 3. Protection of Defendant Nationals of the Forum

While the English and Japanese rules that a claim for tort must be actionable under the law of the forum result in protection for every defendant, in Germany a special limitation upon the application of the law of the place of wrong has been established in favor of defendants of German nationality alone. Article 12 of the Introductory Law to the German Civil Code provides expressly as follows:

"By reason of an unlawful act committed in a foreign country, no greater claims can be enforced against a German than those constituted by German law."

The interference of the local law is understood to involve the existence of liability as well as the measure of damages. Thus, a defendant of German nationality is not condemned, if under German private law he lacks capacity to commit tort, or his act is deemed lawful, or the negligence of the plaintiff was overwhelmingly superior, or the period of prescription has elapsed.<sup>77</sup> It suffices, however, that the award is agreeable to German law under some other theory, such as undue enrichment.<sup>78</sup> The application of article 12 to the cases has been proved very difficult.<sup>79</sup> For its nationalistic narrow-

660; *Ellenwood v. Marietta Chair Co.* (1895) 158 U. S. 105, 15 S. Ct. 771; *Arizona Commercial Mining Co. v. Iron Cap Copper Co.* (1920) 236 Mass. 185, 128 N. E. 4. *Contra*: *The Minnesota courts*, *Little v. Chicago etc. R. Co.* (1896) 65 Minn. 48, 67 N. W. 846; *Peyton v. Desmond* (1904) 129 Fed. 1; and *New York Real Property Law*, § 536.

<sup>76</sup> GOODRICH states that "the more reasonable view seems opposed to the self-imposed limitation of jurisdiction, which seems an archaic survival of outworn rules of venue." (73 U. of Pa. L. Rev. (1924) 24-25; Handb. 229); KUHN, *supra* n. 74, 301. LEFLAR, *Arkansas Conflict of Laws* 56 adduces a very impressive example.

<sup>77</sup> RAAPE 211, VII, 1; 118 RGZ. 141; 129 RGZ. 385, 388.

<sup>78</sup> RG. (Sept. 29, 1927) 118 RGZ. 141.

<sup>79</sup> See the laborious discussion by RAAPE 209, 213 (a); WALKER 530.

ness, the rule was widely criticized,<sup>80</sup> until in the recent dark period it has found praise in Germany.<sup>81</sup>

#### 4. Public Policy as a General Limitation

The various rules discussed above protecting the law of the forum in certain cases against the law of the place of wrong, are specially formed expressions of the general principle that reserves the public policy of the forum. This safety valve for an "outraged feeling of justice"<sup>82</sup> remains available in addition. For example, in case a man was wrongfully killed, a European court that regarded him a subject of the forum would certainly disregard the common law existing at an American place of wrong and not providing a satisfactory remedy.<sup>83</sup>

A former opinion, which has been reflected in recent Italian writings, has argued that an obligation to pay damages resting upon a penal statute of the forum possesses extraterritorial effect at the forum as a unilateral special norm, applicable despite a foreign *locus delicti*.<sup>84</sup> By far the prevailing doctrine rejects this thesis sharply. But the *Código Bustamante* has

<sup>80</sup> 2 ZITELMANN 505; KAHN, 1 Abhandl. 446; WALKER 534; NEUMEYER, IPR. (ed. 1) 32; LEWALD No. 326 *in fine*; RAAPE 209, I, and D.IPR. 324: "the entire doctrine repudiates the provision."

<sup>81</sup> RUDOLPH SCHMIDT, Ort der unerlaubten Handlung 193 enjoys "the protecting effect of article 12 for Germans by helping the German (defendant) even though he may hurt a foreigner," and looks to EG. BGB. art. 30 (public policy) for further tight protection.

The provision has been copied in China, Int. Priv. Law, art. 25 par. 2, and in the Brazilian Draft, art. 86, which contained more such nationalistic clauses (arts. 85-88), but does not appear in the Introductory Law of 1942. The Swiss Federal Tribunal (Sept. 10, 1925) 51 BGE. II 327, 329, does not exclude application of the law of the forum if it were more advantageous to the defendant!

<sup>82</sup> NIBOYET 616; 2 WHARTON 1095 required a fundamental difference of policy.

<sup>83</sup> App. Aix (Jan. 23, 1899) 15 Revue Int. Dr. Marit. 42 (collision on the high seas); Germany: RAAPE 223. Similar isolated suggestions have been made for acts deemed immoral at the forum (RUDOLF SCHMIDT, *op. cit. supra* n. 81 at 193) and fraud or gross negligence (POULETT § 319).

<sup>84</sup> The Italian writings by MANZINI, GHIRON, and SERENI are discussed by MIELE, 5 Giur. Comp. DIP. 84 n. 3.

turned a seemingly related consideration even into a general exception to the application of the *lex loci delicti*, punishable deeds or omissions being subjected to the law containing the penal statute; it is very difficult to understand the working of this rule.<sup>85</sup>

Fortunately, the known cases where courts in this country and elsewhere have refused the application of foreign tort law on the ground of an offended policy of the forum are very few.<sup>86</sup> There are ethically grounded divergences, such as those regarding the right of a spouse to damages from a person who has alienated the other spouse's affection. An Italian<sup>87</sup> and possibly a German<sup>88</sup> court would dismiss such an action based on English or American law. The Swiss Federal Court, on the other hand, has upheld an action for disruption of marriage, despite the contrary Danish domiciliary law of the spouses, though basing the decision on an additional Swiss place of wrong rather than on public policy.<sup>89</sup> Most applications of public policy have been examples of the well-known feeling of superiority. Thus, when a governess, who had been gravely injured by the child of her employer in Hawaii, sued for damages on the ground of parental liability, adopted in the Hawaiian Islands as in all French-influenced legislations, the Supreme Court of California in dismissing

<sup>85</sup> Código Bustamante, art. 167: Those (obligations) arising from crimes or offenses are subject to the same law as the crime or offense from which they arise; art. 168: Those arising from actions or omissions involving guilt or negligence not punishable by law shall be governed by the law of the place where the negligence or guilt giving rise to them was incurred.

<sup>86</sup> For the United States see HANCOCK, Torts 86: "quite unusual"; STUMBERG collects only a few cases.

<sup>87</sup> 3 FIORE § 1267.

<sup>88</sup> RAAPE 198 advocates even in this case the enforcement of the foreign law. H. and L. MAZEAUD, 3 Responsabilité civile (ed. 2, 1934) § 2240, and ESMEIN in 6 Planiol et Ripert § 558, discard foreign rules that would not recognize legitimate defenses; and adopting this suggestion for Belgium, PIRSON et DE VILLÉ, 2 Traité de la responsabilité civile extra-contractuelle (1935) 320 § 407 propose to eliminate foreign laws not making a person liable for fraud and grave fault. Where do such laws exist?

<sup>89</sup> BG. (June 15, 1917) 43 BGE. II 309, 317.

the claim, revived the similarity doctrine and applied—in 1927—the harsh common law rule of the state, as if it were a model.<sup>90</sup> The Court seems to have felt as the Supreme Court of the United States did considerably earlier in applying what it then regarded as the “true” common law rule, namely, the antiquated fellow-servant doctrine under the theory that it embodied the “general law”; for this reason, the claim of a fireman against a railway under Ohio law was defeated, in a case where the plaintiff had suffered injury in an accident in Ohio due to the locomotive engineer’s negligence.<sup>91</sup> The French Supreme Court once declined to give effect to a bank monopoly in the territory of Monaco because of the freedom of commerce in France.<sup>92</sup> The courts, including American and French, seem to have endeavored more recently to avoid such “provincialism,” as Cardozo has termed it in a famous tort case.<sup>93</sup> We shall encounter, however, a few borderline cases.<sup>94</sup> And occasionally courts contrive the application of their own law by such devices as finding at all costs a place of wrong within the forum.<sup>95</sup>

## 5. Rationale

In some countries, the doctrine referring to the law of the forum derived support from analogies with penal law,

<sup>90</sup> *Hudson v. Von Hamm* (1927) 85 Cal. App. 323, 259 Pac. 374; see the just criticism in the Notes, 13 Cornell L. Q. (1928) 266, 26 Mich. L. Rev. (1928) 439.

<sup>91</sup> *Baltimore and Ohio R. Co. v. Baugh* (1893) 149 U. S. 368. Chief Justice Fuller, in his dissenting vote, said that the decision unreasonably enlarged the fellow servant exemption of the employer.

<sup>92</sup> App. Aix (Dec. 19, 1892) S.1893.2.201, *aff'd*, Cass. (req.) (May 29, 1894) S.1894.1.481. *Contra*: NIBOYET 616 n. 3; BARTIN, 2 Principes 404.

<sup>93</sup> *Loucks v. Standard Oil Co. of New York* (1918) 224 N. Y. 99, 120 N. E. 198. See, for instance, the express denial of an objection drawn from public policy in *Loranger v. Nadeau* (1932) 215 Cal. 362, 10 Pac. (2d) 63 (liability to a guest passenger).

French Trib. Valenciennes (Dec. 19, 1935) *Revue Crit.* 1936, 468 (fraudulent seduction, as opposed to status questions).

<sup>94</sup> *Infra* Chapter 25, pp. 274-276.

<sup>95</sup> E.g., Germany: 150 RGZ. 265, 271 on which see *infra* pp. 297 n. 179, 298, 313 n. 39.

under the continuing influence of Savigny. This lasted longer in Latin America than elsewhere, but it has ended also there.<sup>96</sup> Neither jurisdiction nor choice of law can be organized on the same lines for criminal offenses and private tort obligations. Even where a court of criminal procedure is authorized to award equitable damages in ancillary proceedings—the so-called procedure by adhesion—it has to follow its own internal law.

Application of the law of the place of wrong has often been based on the idea that a right to damages is vested in the injured person by that law,<sup>97</sup> or in the famous variant of Mr. Justice Holmes, that the law of the place of the act is the only source of the obligation on which the case depends.<sup>98</sup> These attempted justifications merit the same reproach as the vested rights theory in general.<sup>99</sup>

European authors, continental and English, have been more inclined to explain the rule upon grounds of policy. A person owes obedience to the law of the country in which he is actually present. It is that law under which he is living at the time of the conduct complained of, and it is that law alone which can claim to determine the legality or illegality of his actions,<sup>100</sup> the law to whose standards he must elevate his behavior. He who stays in a state is subject to the legal

Italy: Cass. (April 2, 1927) *Foro Ital.* Mass. 1927 II 472, cited by MIELE, 5 *Giur. Comp. DIP.* 84 n. 1.

<sup>96</sup> See, for instance, 2 *BAR* 118; *ALCORTA*, 2 *Der. Int. Priv.* 346; 3 *VICO* 137 § 159.

<sup>97</sup> United States: *BEALE*, 3 *Summary* §§ 1-5, reproduced 3 *BEALE* 1968; *Cardozo, J.*, in *Loucks v. Standard Oil Co. of New York* (1918), *supra* n. 93, 224 *N. Y.* at 120; more cautious, *GOODRICH* 220.

England: Strangely enough, *CHESHIRE* 294 adheres to this approach which he generally rejects.

<sup>98</sup> Mr. Justice Holmes in *Slater v. Mexican Nat'l R. Co.* (1904) 194 *U. S.* 120, 126; in *Western Union Telegraph Co. v. Brown* (1914) 234 *U. S.* 542, 547. Similarly, it is said in France that the law of the country is competent where the accident as generating factor occurs; see *CRÉMIEU*, 5 *Répert.* 491 No. 6.

<sup>99</sup> *COOK*, 35 *Col. L. Rev.* (1935) 202, *Legal Bases* 311.

<sup>100</sup> *CHESHIRE* 294.

order of that state, or, according to the old fiction, he "submits" himself to the state.<sup>101</sup> At the moment of the act, the author and the victim of a wrong move in social surroundings in which they may appreciate their risks and potential liabilities under the local law. The reasonable expectations of the parties cannot be protected otherwise.<sup>102</sup>

In recent years, however, this individualistic and educational theory has been partly replaced by the governmental consideration of social policy that regards the law of torts as a law of "social defense" and under which it appears that the state where the injury occurs has a predominant interest to protect the injured private interests and to determine the legal effects of the injury. The primary object of the law of torts is to regulate the social order and prevent its infringement; the secondary concern is to compensate the victims of violations of this order. The state cannot fulfill this duty without including foreigners in its commands.<sup>103</sup>

This line of thought leads back to the more solid part of the ancient theory of territoriality. Every state has a legitimate interest, right, and duty to determine the licit or illicit character and the effects of acts committed on its soil.<sup>104</sup>

In this sense, the law of torts has been classified in France under the heading of the "laws of public safety and police" (*lois de sûreté et de police*), declared in article 3 of the Civil Code to be imperative.<sup>105</sup> These laws do not present "public policy" in contrast with a foreign applicable law, but, as public law, are territorial by virtue of their normal force.<sup>106</sup>

<sup>101</sup> As late as 1933, Mr. Justice Brandeis in *Young v. Masci* (1933) 289 U. S. 253 applied this idea to a nonresident owner of a car who authorizes its use in the state. See *infra* Chapter 23, p. 270 n. 72.

<sup>102</sup> RHEINSTEIN, "The Place of Wrong," 19 Tul. L. Rev. (1945) 4, 17ff.

<sup>103</sup> See the various arguments of 8 LAURENT 24 § 10; ROLIN, 1 Principes 577; LEREBOURS-PIGEONNIÈRE §§ 251 and 294; BARTIN, 2 Principes 417; POULLET § 317.

<sup>104</sup> FEDOZZI 759: It is logical that the law governing on the territory determines the effects and consequences of its own violation; WALKER 522; BARTIN, 2 Principes 387 § 330.

<sup>105</sup> 3 FIORE § 1263; NIBOYET § 490.

<sup>106</sup> CRÉMIEU, 5 Répert. 493 No. 13.



Each state is said to be in the best position to evaluate its local conditions, as well as the habits and needs of its population.<sup>107</sup>

Finally, the interests of the injured person are emphasized when it is apparently felt that the natural place for the victim to seek redress would be the place where his injury occurred, and if he cannot sue in this jurisdiction, he should at least be treated upon the basis of its law.

Some of these arguments may appear phrased too neatly and open to one objection or another. But the principle of the *lex delicti commissi* ought not to be deduced from a single, all-embracing rationale of absolute validity. In searching the relatively most convenient local contact for an alleged tort, it is reasonable and relatively simple to connect it with the territory where it was committed. There remains, of course, the additional task of determining the territory in which a tort should be considered as having been committed, and this choice has been unhappily influenced by individual selection from the mentioned reasons for the *lex loci delicti commissi*.

The advantages of the principle of the *lex loci delicti commissi* are strong enough to have secured to it an almost universal adherence. The English rule, on the other hand, although it has found favor with a solitary French author<sup>108</sup> and indulgent consideration in this hemisphere,<sup>109</sup> has lost ground in England itself. Cheshire recognizes fully the "superior claim of the *lex loci*." Inasmuch as the English rule requires actionability under the English law of the forum, he tries to excuse this requirement as a clear-cut application of the principle of public policy, easy to be applied because of its simplicity.<sup>110</sup> This is an exorbitant and harmful

<sup>107</sup> 2 ARMINJON (ed. 2) § 120.

<sup>108</sup> VALÉRY 974 § 676.

<sup>109</sup> RHEINSTEIN, "The Place of Wrong," 19 Tul. L. Rev. (1945) 4, 23; 13 U. of Chi. L. Rev. (1945) 111 advocates it; justice of the results only is questioned by FALCONBRIDGE, "Torts in the Conflict of Laws," 23 Can. Bar Rev. (1945) 309, 314, 316; *id.*, Conflict of Laws (1947) 701 ff.

<sup>110</sup> CHESHIRE 302.

kind of public policy, however, explained only, as Hancock remarks, as a remainder from the time when the common law jurisdictions "dimly perceived" the conflicts problem.<sup>111</sup> The consequences in the courts of Canada are deterrent examples.<sup>112</sup> American and Continental lawyers alike claim that a state which assumes to regulate conduct carried on upon its soil ought to concede a corresponding power to all other states. While a state may refuse to apply in its criminal courts any criminal law other than its own, such an exaggerated extension of public policy in matters of private law contradicts the very idea of conflict of laws.

<sup>111</sup> HANCOCK, Torts 88.

<sup>112</sup> HANCOCK, Torts 89, *supra* n. 57.

## CHAPTER 25

### The Scope of the Principle

#### 1. The Law of Wrong Governs Capacity to Commit a Tort<sup>1</sup>

**T**HIS universal rule operates in Continental and English courts as a considerable breach in the personal law, while it conforms to the territorial doctrine maintained in the United States subjecting transactions of various kinds to the law of the place where the "act is done."

*Illustration.* An American youth of 15 years, by driving a car in Brazil, injures a person. In all courts, his responsibility is to be determined according to the Brazilian Civil Code, article 156, which is understood as rejecting liability of persons under sixteen years.<sup>2</sup> A Brazilian boy of the same age, acting in Venezuela, is capable according to his faculty of discernment (Venezuelan Civil Code, article 1186).

Equitable compensation for damage done by an irresponsible individual, now frequently provided after the pattern of article 829 of the German Civil Code,<sup>3</sup> is naturally included in the law of wrong.<sup>4</sup>

#### 2. Unlawfulness

Liability for tort, in contrast to other forms of liability

<sup>1</sup> Restatement §§ 379-381 (by implication).

Germany: RAAPE 197.

Norway: CHRISTIANSEN, 6 Répert. 579 No. 154.

Poland: Int. Priv. Law, art. 11 No. 2.

Switzerland: BECK 137 n. 20. *Contra*: for the present law, SCHNITZER 289 (ed. 2, 544) with formalistic arguments.

<sup>2</sup> J. M. DE CARVALHO SANTOS, 3 Código Civil Brasileiro Interpretado (ed. 3, 1942) 298; CLOVIS BEVILAQUA, 1 Código Civil (ed. 6, 1940) 420.

<sup>3</sup> The Belgian C. C. art. 1386 *bis*, as amended by Law of April 16, 1935, formulates the idea more correctly: the judge may hold a lunatic or abnormal person liable to pay what he would be obligated to, if he had control of his acts.

<sup>4</sup> However, BARTIN, 2 Principes 398 § 333 would follow French public policy in the case of a French defendant.

created by law, presupposes that the conduct causing the harm be unlawful. This requirement has two phases regarding the type of interests invaded, and the circumstances of the invasion.

(a) *Illicit conduct*. The various legislations determine differently the spheres within which private persons are protected and those left to free action by the other members of the community. A fundamental cleavage exists between the two great systems, of which one establishes separately shaped torts and the other recognizes a general tort liability. The first is represented by the common law as well as by the Roman law and the German Civil Code, the second by the French Civil Code and its numerous followers.

The primary question to be asked under the law of wrong is, therefore, whether the facts complained of constitute forbidden conduct. In regard to omissions, which cannot be tortious without violation of a general duty, it seems to be recognized, conforming to principle, that the duty must be imposed by the law of the place of wrong.<sup>5</sup> Thus, failure by a locomotive driver to signal at a railway crossing, and failure of an employer to guard dangerous machinery, are considered wrongful to the extent admitted by the law at the place.<sup>6</sup> What the extracontractual duties of a bank are in paying a check, is determined by the local law.<sup>7</sup>

(b) *Authorized acts*. An invasion of interests, not ordinarily allowed, may yet be lawful under particular circumstances constituting justification and excuse. The law of wrong determines these exceptions to liability such as self-defense, defense of other persons or of the interests of the state, consent or assumption of risk by the injured person, legislative, judicial, or executive acts, or authorization by the state.

<sup>5</sup> The question is, however, what place this is. See *infra* Chapter 26, p. 312.

<sup>6</sup> See Restatement § 384; HANCOCK, Torts 107.

<sup>7</sup> App. Paris (June 23, 1899) Clunet 1901, 128.

The Restatement (§ 382) mentions some of these defenses for the particular purpose of assigning them to the law of the place of "acting" rather than to the law of the place where the harm is done. At this juncture, it is important only that they are not governed by the law of the forum. However, it should be noted that the existence and extent of disciplinary rights of husbands, parents, guardians, teachers, and so forth are governed by none of these laws but are subject to their proper conflicts rules. Whether, for example, a father may forcibly coerce his child or a husband may open the letters of his wife, depends on the family law applicable. As we have seen before, in American courts such incidents are usually determined by the temporary common residence of the parties, which may be, or may not be, identical with the place of wrong or the forum.

### 3. Causation and Fault

(a) *Causation*. There are not five or more meanings of causation to deal with here, but only two, a logical and a juridical denotation. Causal nexus, causation in its only logical meaning, exists when the conduct complained of is one of the antecedents in the sequence of events resulting in the injury—a "*conditio sine qua non*"—i.e., the harm would not have happened if the act had not been done. Such causal connection, although necessary for any liability, a requirement sometimes neglected,<sup>8</sup> is not the only qualification of a juridically significant causation. The doctrines concerning its other elements vary. The Anglo-American doctrine of proximate causation, the German theory of "adequate causation," and the French view halfway between the first two, have much in common, as they all seek to eliminate the influence of extraordinary events on the reasonably foresee-

<sup>8</sup> Even POLLOCK, *Torts* 123 fails to make these concepts clear.

able course of things. But they vary in details.<sup>9</sup> Also among the jurisdictions of this country, certain differences exist, for instance in regard to the scope of proximate effects.<sup>10</sup>

The principle implies that all courts observe the rules of the courts at the place of wrong.

(b) *Fault*. The law of wrong further determines, whether fault is a condition of liability and, if so, whether it may be ordinary negligence (*culpa levis* in Romanistic language) or has to be gross negligence or wanton recklessness (*culpa lata*) or some intermediary degree of culpability (*culpa in concreto*).<sup>11</sup> A divergent standard used at the forum certainly does not involve public policy.<sup>12</sup>

American courts, for instance, hold an automobile driver liable to a guest passenger for injury suffered, as the law of the wrong requires, either for nonobservance of ordinary care and skill or only for gross negligence.<sup>13</sup> The law of the forum is immaterial in this regard.

Mere questions of evidence respecting negligence,<sup>14</sup> of course, are determinable by the law of the forum. Jury findings, moreover, may be uncontrollable to the extent to which they follow a foreign view.<sup>15</sup>

(c) *Contributory negligence*. The law of wrong governs any behavior of the plaintiff influencing causation or avoidable consequences. This conduct, despite such expressions as contributory negligence, cannot be "fault" in the strict sense

<sup>9</sup> A comparative study has been undertaken in my *Recht des Warenkaufs* 473 ff.

<sup>10</sup> Illustrations in Restatement § 383 and by HANCOCK, Torts 108.

<sup>11</sup> Restatement § 379.

<sup>12</sup> Expressly to this effect, in the case of a more severe standard for the forum: *Loranger v. Nadeau* (1932) 215 Cal. 362, 10 Pac. (2d) 63; *Eskovitz v. Berger* (1936) 276 Mich. 536, 268 N. W. 883.

<sup>13</sup> See the collection of cases by HANCOCK, Torts 105. Against the usual superficial assertions that degrees of fault are practically impossible, see True-man, J. A., in *Knutson v. Rawn* [1943] 2 D. L. R. 582.

<sup>14</sup> For burden of proof and presumptions see *infra* 10(b) pp. 283 ff.

<sup>15</sup> HAMSHAW, Note, 4 Mo. L. Rev. (1939) at 305; cf. the informative note by HANCOCK, Torts § 33 on determination of facts by court or jury.

of the word, which would require the existence and violation of a duty toward another person. What the plaintiff may have infringed, was a precept for his own benefit. But his conduct is evaluated in analogy to the standards of the care due to others.<sup>16</sup> The law of wrong is competent to define the effects:<sup>17</sup> whether plaintiff is barred from his action according to the common law principle of contributory negligence,<sup>18</sup> whether his action depends on somewhat more modern theories such as that of "last clear chance," or the recovery of damages is subject to a deduction proportionate to the plaintiff's contribution to the end result.<sup>19</sup>

*Illustrations:* (i) A brakeman injured in the Province of Quebec suing his employer in Vermont, was permitted recovery under the Quebec theory of comparative negligence, although Vermont law shared in the common law doctrine of contributory negligence.<sup>20</sup>

(ii) The plaintiff's conduct having contributed to the damage, done in a place where French law was in force, the Reichsgericht applied the doctrine of the French courts of balancing the actions of both parties, although the Reichsgericht itself had developed a different theory when the Code Napoléon was in force in the Rhineland.<sup>21</sup>

If under a statute a party is liable without fault, as a railway may be in case of accident, this party's own claim for damages suffered in such case will generally also be reduced by reason of having contributed to its own damage by mere causation. In any case, the law of wrong decides how to estimate the factors of the damage.

<sup>16</sup> Cf. 2 Restatement of the Law of Tort § 463.

<sup>17</sup> Restatement § 385.

<sup>18</sup> The Canadian Supreme Court in *Ottawa El. R. Co. v. Letang* [1924] S. C. R. 470 applying Ontario law as that of the place of wrong dismissed the action, in subordinating contributory negligence (wrongly) to the maxim "scienti non fit injuria."

<sup>19</sup> For cases, see STUMBERG 169 n. 25; HANCOCK, Torts 111 n. 6.

<sup>20</sup> *Morrisette v. Canadian Pacific R. Co.* (1904) 76 Vt. 267, 56 Atl. 1102.

<sup>21</sup> RG. (March 12, 1906) JW. 1906, 297.

*Illustration.* A street car of the plaintiff, a Swiss company, collided on the territory of the Swiss Canton Basel with the motor truck of the German defendant. The German courts applied the Swiss law of March 28, 1905, on the liability of railroads for risk, to judge the quasi liability of the plaintiff street car company; assumed negligence of the defendant under article 41 of the Swiss Code of Obligations; and distributed the damages in the proportion of two-thirds to one, according to article 44 of this Code.<sup>22</sup>

In a singular American case, a wife was injured by a third person in an accident for which her own husband was jointly responsible. Her claim against the tortfeasor was made dependent on the question whether her husband would benefit by her recovery. This latter question was subjected to the law of the place of wrong,<sup>23</sup> by exaggerating the usual encroachment of this law on family relations.

*Characterization.* All these rules are substantive and susceptible of foreign application. This has been fully realized, not only in cases where the laws of the place of wrong and of the forum agreed in characterizing their rules on contributory or comparative negligence as substantive in all respects,<sup>24</sup> but also where the rule of the forum was regarded as "procedural for most purposes."<sup>25</sup> We may add that, even if at the place of wrong concurrent fault of the plaintiff is treated as a bar to his action under some procedural view, the action has to be dismissed because this is the "law" to which we are referred. This probably is true everywhere without regard to the usual fallacies of "characterization."

<sup>22</sup> OLG. Karlsruhe (Oct. 28, 1931) IPRspr. 1932 No. 41.

<sup>23</sup> Traglio v. Harris (1940) 104 F. (2d) 439; Note, 127 A. L. R. 813.

<sup>24</sup> Fitzpatrick v. International R. Co. (1929) 252 N. Y. 127, 169 N. E. 112 (applying Ontario law); HANCOCK, Torts 120 n. 17.

<sup>25</sup> Precourt v. Driscoll (1931) 85 N. H. 280, 157 Atl. 525; Kingery v. Donnell (1936) 222 Iowa 241, 246, 268 N. W. 617, 620; Restatement §§ 385, 595 comment a; ROBERTSON, Characterization 259.



## 4. Proper Plaintiff

The *lex loci delicti* governs:<sup>26</sup>

(a) *Beneficiary of the tort claim.* Thus, a Scotch court dismissed an action of a woman seduced in London on the ground that English common law gave the right of action to her parents only.<sup>27</sup> In the United States, the death statute of the state of wrong decides the beneficiaries on behalf of whom representative action should be brought.<sup>28</sup>

Suppose an American is negligently killed in Switzerland by a German. The personal action does not disappear as under common law, nor does any American death statute apply, neither will the German rule govern, entitling the relatives having a legal claim to be supported by the deceased. Instead, all courts will apply the Swiss rule under which all persons deprived of their support by the death may sue for compensation.<sup>29</sup>

Consistently, the Quebec court has applied the domiciliary law of Massachusetts to the action of a husband for the loss suffered by himself through the death of his wife.<sup>30</sup> Notably, the Belgian Supreme Court applying the French law of workmen's compensation to a minor's death occurring in France, has refused an exception of public policy against the French provision granting the right to sue only to the relatives living in France at the time of the accident.<sup>31</sup>

On the other hand, it is correct for a court of a civil

<sup>26</sup> *Sapone v. New York Central R. Co.* (1927) 225 N. Y. Supp. 211, Clunet 1928, 795 criticized in procedural respects in Note, 37 Yale L. J. (1928) 666; WHARTON 1127; GOODRICH 253 § 101; LORENZEN, 47 Law Q. Rev. (1931) at 497; KUHN, 21 Recueil (1928) I at 263.

<sup>27</sup> *Ross v. Sinjee* (1891) 29 Scot. L. R. 63.

<sup>28</sup> HANCOCK, Torts 124; see *ibid.* his considered review of the cases dealing with the interpretation of the statutes ordaining distribution of the damages in the same proportions as personal property of a deceased intestate.

<sup>29</sup> See Swiss Code Obl., art. 45 par. 3, cf. German BGB. §§ 844 par. 2, 845.

<sup>30</sup> *Lister v. McAnulty* [1943] Que. K. B. 184.

<sup>31</sup> Belgium: Cass. (Feb. 21, 1907) *Pasicrisie* 1907.1.135.

law country to assume that the applicable statute of distribution determines who is the beneficiary after the death of an injured person having acquired an inheritable right against a tortfeasor. Thus, where a domiciliary of New York had suffered an automobile accident in France and died in New York, and the surrogate's court of New York appointed an executor, the French Court of Cassation recognized this executor as a successor to be the right plaintiff to enforce the tort action in France, whereas the court below had insisted that according to the French law, being the *lex loci delicti*, the heirs had to appear.<sup>32</sup> Evidently, the courts were not aware of the American controversies regarding the application of death statutes. In any event, an American court should recognize in this case that French law, including its conflicts law, decided to whom the action belonged.

(b) *Indirect harm.* Whereas in many legislations, including the French, all persons injured by the tortious act are entitled to claim damages, in others, particularly in German law, only the person "directly harmed" may sue. If, for instance, goods sold but not delivered are injured and the title has not passed, the buyer may sue the tortfeasor under French but not under German law. Which law governs depends on the place of wrong. The same is to be said with respect to the Anglo-American rule that injury, not malicious or fraudulent, inflicted upon a person does not give rise to an action for damages by a third person suffering a loss in his contractual right against the injured.<sup>33</sup>

(c) *Plaintiff in own name on behalf of the injured.* The question who may bring the suit on behalf of the party entitled, in the opinion of Beale, is a procedural matter,<sup>34</sup> but

<sup>32</sup> Cass. (crim.) (June 4, 1941) Clunet 1945, 112.

<sup>33</sup> KENNY, 62 C. J. 1120 § 30. On the question of whether seller or buyer or both may sue for tortious injury to the object of a sales contract, a complicated proposal appears in the Final Draft No. 1 of a Revised Uniform Sales of Goods Act § 127.

<sup>34</sup> Restatement § 588; 3 BEALE 1603.

this assertion conflicts with the prevailing practice of applying the death statutes<sup>35</sup> governing the wrong. Whether a husband may enforce the claim of his wife in his own name or a parent in the name of his or her child is also determined in this country by the law of wrong (see *infra* p. 265), whereas abroad the law governing marital property<sup>36</sup> applies.

### 5. Proper Defendant

(a) *Co-obligors*. Although a few authorities have applied local procedural law to the question whether co-obligors must be joined in an action,<sup>37</sup> it is the consistent and prevailing opinion that the entire problem of determining the persons to be sued pertains to the law of the place of wrong. This includes the questions whether several debtors are liable for the whole damage jointly, or jointly and severally, or separately, each for the damage done by him, and whether the action may, or must, be directed against the several debtors jointly or separately.<sup>38</sup> Only the manner of bringing the suit against such obligors pertains to the procedure of the forum.<sup>39</sup>

(b) *Claim against the insurer of the tortfeasor*. The injured person enjoys a direct action against the insurer of the tortfeasor, if, and only if the law of the place of tort gives it. The French law imposing direct liability on the insurer<sup>40</sup>

<sup>35</sup> See HANCOCK, Torts 126ff.

<sup>36</sup> Canada, Ontario: Lucas v. Coupal (1930) 66 O. L. R. 141 (suit by mother).

Germany: BGB. § 1380; E. G. art. 15.

<sup>37</sup> General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877, 152 Eng. Re. 1061; Fryklund v. Great Northern R. Co. (1907) 101 Minn. 37, 111 N. W. 727; 3 BEALE 1603.

<sup>38</sup> Mosby v. Manhattan Oil Co. (C. C. A. 8th 1931) 52 F. (2d) 364; HANCOCK, Torts 109, 120 n. 16, 132.

<sup>39</sup> STUMBERG 220 n. 74.

<sup>40</sup> C. C. art. 2102 § 8, as amended by Law of May 28, 1913; Cass. (req.) (Feb. 24, 1936) Ocean Accident v. Dewinter, D.1936.1.49, S.1936.1.161, Revue 1937, 441. The Appeal Court of Orleans (Dec. 21, 1936) Nouv. Revue 1936, 751, simply recognized the *lex loci delicti*, although it ascribed exclusive jurisdiction over the Swiss insurer to the Swiss courts, under the then existing text of the French-Swiss Convention of 1869. On the various arguments in the lower courts, preceding these decisions, see J. DONNEDIEU DE VABRES 595ff.

necessarily applied in a case where an automobile accident occurred in France. It was needless for the French Court of Cassation to stress the public interest involved.<sup>41</sup>

The problem, however, has been regarded as more complicated in this country. On one hand, a statute imposing upon an insurer direct responsibility to the injured third party has been held binding with respect to all contracts made in the state, irrespective of the place where an injury occurs.<sup>42</sup> On the other hand, cases conflict on the question whether the direct recourse provided by the state of the place of wrong may be applied to a foreign insurer who has contracted outside the state.<sup>43</sup> Although the refusal to apply the law of the place of injury certainly should not be based on the ground that it concerns only a remedy,<sup>44</sup> both opinions have been supported by policy considerations.<sup>45</sup> But it seems that when the insurance contract covers injuries committed by the insured party in the state where the tort occurs, there is no valid reason why the statute of the state of wrong should

<sup>41</sup> See the criticism of Cass. (Feb. 24, 1936) *supra* n. 40, by BATIFFOL, *Revue* 1937, 441 and ESMEIN, 11 *Zausl.PR.* (1937) 861. But a Swiss writer, ED. SCHMID, "Zur Frage der Rechtsanwendung bei Verkehrsunfällen Schweizerischer Motorfahrzeugbesitzer im Ausland," 35 *SJZ.* 248, has urged that the Swiss Law of 1932, art. 49, granting the injured person a direct suit against the insurer should be applied in the case of Swiss insurance parties and a German place of accident, while the Appeal Court of Zürich (Feb. 23, 1938) 38 *Bl.f.Zürch.Rspr.* (1939) 356 No. 145, 41 *Bull. Inst. Int.* (1939) No. 10753 conformed to the (German) law of the place of wrong.

<sup>42</sup> *HANCOCK*, Torts 240; *Cormier v. Hudson* (1933) 284 *Mass.* 231, 187 *N. E.* 625 (statute of the forum); *Farrell v. Employers' Liability Assurance Co.* (1933) 54 *R. I.* 18, 168 *Atl.* 911, Note, 18 *Minn. L. Rev.* (1933) 737 (implied).

<sup>43</sup> *Denying the liability*: *Riding v. Travelers' Ins. Co.* (1927) 48 *R. I.* 433, 138 *Atl.* 186; *Martin v. Zurich General Accident Co.* (C. C. A. 1st 1936) 84 *F.* (2d) 6; *Lowery v. Zorn* (C. A. La. 2d 1934) 157 *So.* 826, 831.

*Allowing the recourse*: *Kertson v. Johnson* (1932) 185 *Minn.* 591, 242 *N. W.* 329 (law of Wisconsin applied in Minnesota); *Burkett v. Globe Indemnity Co.* (1938) 182 *Miss.* 423, 181 *So.* 316; cf. *HANCOCK*, Torts 241ff.

<sup>44</sup> Thus *McArthur v. Maryland Casualty Co.* (1939) 184 *Miss.* 663, 186 *So.* 305. *Contra*: *HANCOCK*, Torts 242.

<sup>45</sup> *Correct*: *Kertson v. Johnson* (1932) 185 *Minn.* 591, 242 *N. W.* 329; but see cases and discussion by *HANCOCK*, Torts 241 whose arguments for doubt I cannot follow.

not be able to turn the claim for damages directly against the insurer. Nothing more is done thereby than that the insurance claim is transferred, by operation of law, from the injurer to the injured, instead of the longer way of recourse by assignment, which may be voluntary or by way of garnishment. The insurance company does not lose any advantage and cannot complain about any mentionable extension of its liability. Any other solution jeopardizes the efficacy of the law of the place of wrong.

## 6. Influence of Family Relations

American courts extend the law of the place of wrong to the problems: whether a married person may sue the other spouse for tort suffered during the marriage,<sup>46</sup> and even whether a claim for injury may be brought after the parties marry each other in another state;<sup>47</sup> whether a claim belongs to the injured wife<sup>48</sup> or to the husband<sup>49</sup> or to the community property;<sup>50</sup> whether a wife may avail herself of the claim of her injured husband.<sup>51</sup>

Nevertheless, when New York law prohibited litigation between spouses, the Court of Appeals of New York extended the prohibition to domiciled spouses also in the case of an injury committed in a state allowing such suits.<sup>52</sup> This

<sup>46</sup> *Dawson v. Dawson* (1931) 224 Ala. 13, 138 So. 414; *Howard v. Howard* (1931) 200 N. C. 574, 158 S. E. 101; *Gray v. Gray* (1934) 87 N. H. 82, 174 Atl. 508; *Darian v. McGrath* (Minn. 1943) 10 N. W. (2d) 403 (injury in Wisconsin, action against husband would be allowed despite the contrary domiciliary law of the forum, hence wife is granted relief against the car owner).

<sup>47</sup> *Buckeye v. Buckeye* (1931) 203 Wis. 248, 234 N. W. 342 (law of Illinois contrary to the domiciliary law of Wisconsin). See Notes, 29 Mich. L. Rev. (1931) 937, 1072; 79 U. of Pa. L. Rev. (1931) 804; 44 Harv. L. Rev. (1930) 1138; 31 Col. L. Rev. (1931) 884; 6 Wis. L. Rev. (1931) 103.

<sup>48</sup> *Texas & Pac. R. Co. v. Humble* (1901) 181 U. S. 57.

<sup>49</sup> *Snashall v. Metropolitan etc. R. Co.* (1890) 8 Mackey (D. C.) 399; see *GOODRICH* 328 n. 18.

<sup>50</sup> *Justs v. Atchison etc. R. Co.* (1910) 12 Cal. App. 639, 108 Pac. 328.

<sup>51</sup> *Usher v. West Jersey R. Co.* (1889) 126 Pa. St. 206, 17 Atl. 597.

<sup>52</sup> *Mertz v. Mertz* (1936) 271 N. Y. 466, 3 N. E. (2d) 597; Note, 108

decision has been followed in some other jurisdictions.<sup>53</sup> The action against the spouse or his insurer may thus fail due to one or the other of both statutes involved. The New York court has not allowed its own new policy of permitting the suit,<sup>54</sup> to prevail against a foreign statute barring it.<sup>55</sup>

However, the contrary approach, exclusively applying the personal law that governs the marital relations, has increasingly found sympathy with American writers.<sup>56</sup> This is the common view held in all the world.<sup>57</sup> In a recent case,<sup>58</sup> Judge Learned Hand refused to give effect to the common law rule governing tort in Florida, whereby a husband would be liable for his wife's tort committed in Florida in his absence. Both spouses were citizens of New York, and the various reasons for exonerating this resident from vicarious liability may seem debatable.<sup>59</sup> But the emphasis on the domiciliary law in this case confirms the trend.

The Louisiana Court, however, abandoned its domiciliary principle<sup>60</sup> in favor of the prevailing approach in a recent case where a wife, injured by the negligence of her husband in Louisiana, sued the insurance company in Louisiana. The defendant objected that under the law of Texas, the domicile of the spouses, the claim belonged to the community property

A. L. R. 1126. Against the argument of the court that the common law prohibition of actions between spouses belonged to procedure, see HANCOCK, *Torts* 236.

<sup>53</sup> *Poling v. Poling* (1935) 116 W. Va. 187, 179 S. E. 604; *Kircher v. Kircher* (1939) 288 Mich. 669, 286 N. W. 120; *Kyle v. Kyle* (1941) 210 Minn. 204, 297 N. W. 744 (no action despite the law of Wisconsin).

<sup>54</sup> § 57 Domestic Relations Act, as amended by Laws 1937, c. 669 § 1.

<sup>55</sup> *Coster v. Coster* (1943) 289 N. Y. 438, 46 N. E. (2d) 509; *Note*, 146 A. L. R. 702, 705.

<sup>56</sup> STUMBERG 186; COOK, *Legal Bases* 248, 345; HANCOCK, *Torts* 236; RHEINSTEIN, 41 Mich. L. Rev. (1942) 83, 95 and 19 Tul. L. Rev. (1944) 199.

<sup>57</sup> See Vol. I, 322, 606.

<sup>58</sup> *Siegmann v. Meyer* (C. C. A. 2nd 1938) 100 F. (2d) 367.

<sup>59</sup> Particularly in extending the position taken by Justice Brandeis and Judge Learned Hand in the case of an absentee-nonresident employer, on which see below pp. 267 ff. In other respects *cf.* *Note*, 52 Harv. L. Rev. (1939) 834; HANCOCK, *Torts* 255.

<sup>60</sup> *Williams v. Pope Manufacturing Co.* (1900) 52 La. Ann. 1417, 27 So. 851.

fund and only the husband was entitled to sue. The court disregarded the law of the domicile preferred hitherto. Instead, it stated that the right to sue would ordinarily be subject to the law of the forum, but that suing the husband is also concerned with a substantive problem governed by the law of the place of wrong which therefore is also to be consulted.<sup>61</sup> This approach is really untenable.

## 7. Vicarious Liability

(a) *Principle*. It may be stated as a universal principle, though certain limitations are in discussion, that the law of the place of wrong determines the liability of third persons who are not tortfeasors, accomplices, instigators, or accessories.

This proviso should be noted. Vicarious liability is not in question, if the third person is a tortfeasor himself. For instance, if the general concessionaire of an amusement park has contracted with an independent manufacturer of fireworks for a display, he may be sued for his own negligence, if he did not take care that the premises were kept in a safe condition for the public invited by him.<sup>62</sup> He may incur vicarious liability, however, if he is responsible under the applicable law for the negligence of the independent contractor.

The liability involves such persons as masters of servants, parents of minor children, custodians of juvenile or dangerous persons, schoolmasters or artisans in respect to pupils and apprentices, employers of independent contractors for risk inherent to the work, or owners of vessels, as the various laws may ordain their liabilities.<sup>63</sup> The English case of *The*

<sup>61</sup> *Matney v. Blue Ribbon, Inc.* (1942) 12 So. (2d) 253; Note, 18 Tul. L. Rev. (1943) 319.

<sup>62</sup> *Sebeck v. Plattdeutsche Volkfest Verein* (1900) 64 N. J. Law 624, 46 Atl. 631. Cf. in general, Restatement of Torts § 875 in connection with §§ 430-453.

<sup>63</sup> United States: Restatement § 387; Note, 47 Harv. L. Rev. (1933) 349.

Belgium: Trib. Antwerp (Jan. 23, 1936) Jur. Port d'Anvers 1936, 197. See also POULLET 398 § 318 (with some restrictions).

*Mary Moxham* is typical for the negative side of this principle. Negligent navigation in a Spanish harbor not constituting a cause of liability of the vessel's owner according to Spanish law, the court in England disregarded the English law which would have made him responsible.<sup>64</sup> On the other hand, a Michigan freight transport company using the services of a truck owner by contract for hauling freight is held answerable even in Michigan courts for negligence of the independent contractor, in conformity with the law of the Ohio place of accident, whereby a common carrier cannot delegate its duties to ensure public safety.<sup>65</sup>

(b) *Persons out of state.* Although the principle is firmly established everywhere, except under the dual requirement of English law, some doubts have arisen respecting the propriety of the imposition of liability by the state of wrong on a person, not a subject, who, according to the premises of our topic, is innocent, though a cause of the tort. These scruples have taken diverse shapes in this country and in Europe. A small group of European writers and courts have claimed that liability cannot be imposed on an innocent third person except by the law which is considered his personal law.<sup>66</sup> Otherwise, it has been argued, foreigners lacking any

Germany: ROHG. (Jan. 19, 1878) 23 ROHGE. 174; RG. (Sept. 23, 1887) 19 RGZ. 382; (July 1, 1896) 37 RGZ. 181; (May 30, 1919) 96 RGZ. 96. See for other cases LEWALD 267 No. 324 *sub* (4); RAAPE 226.

The Netherlands: Hof Amsterdam (June 5, 1914) W. 9753 (Englishmen damaged by receipt with false signature issued in Germany by a bookkeeper beyond the course of his employment in the service of a Dutch firm in Utrecht; § 831 of the German BGB. applied); H. R. (March 18, 1938) W. 1939 No. 69 as commented by the Note (MEIJERS) *ibid*.

Switzerland: 2 MEILI 94.

<sup>64</sup> The *Mary Moxham* (C. A. 1876) 1 P. D. 107. Cf. ROBERTSON, "Law for Tort Liability," 4 Modern L. Rev. (1941) 35.

<sup>65</sup> Laughlin v. Michigan Motor Freight Co. (1936) 276 Mich. 545, 268 N. W. 887. Restatement § 387 (c) illustration 3.

<sup>66</sup> 2 BAR 122; 2 ZITELMANN 533; OLG. Hamburg (April 5, 1895) 6 Z.int.R. 170 and (Nov. 12, 1906) 14 ROLG. 391; OLG. Karlsruhe (Dec. 18, 1917) 20 Badische Rechtspraxis 99 (cited by LEWALD 267).

Switzerland: BG. (April 10, 1896) 22 BGE. 471, 486. A particular opinion has been suggested by BARTIN, 2 Principes 430 § 340: the law governing the contractual relationship between master and servant. *Contra*: 2 MEILI 94.



connection with a state, might be involved, at the pleasure of the state, in heavy obligations without being able to avoid them.<sup>67</sup> Hence, a Swiss principal employing a traveling salesman, who injures someone in France by negligently handling inflammable material, would be free from liability under Swiss law, by proving that he has chosen and supervised his agent with due care.<sup>68</sup> The prevailing approach allows no such exemption, the *commettant* (master) being absolutely liable for the fault of his *préposé* committed in the course of the employment in France, according to French law.<sup>69</sup>

In this country, in the same vein, two outstanding judges have penetrated the problem from the angles either of the constitutional requirement of due process or of a peculiar requirement brought into the conflicts rule. In both cases the question was whether the owner of a car, who had been out of the state at all material times could be held liable for negligence of the driver on the ground of a statute at the place where the accident occurred subjecting the owner to liability.

The first case was concerned with the New York statute imposing absolute liability on the owner of a car, if the negligent driver was "in the business of such owner or otherwise . . . legally using or operating the same with the permission, express or implied, of such owner."<sup>70</sup> The courts of New Jersey, the domicile of the defendant owner, applied the New York statute as *lex loci delicti* on the ground of the owner's permission to take the car to the state of New York.<sup>71</sup> The Supreme Court of the United States affirmed the constitutionality of this choice of law.<sup>72</sup> Mr. Justice Brandeis, in delivering the judgment, reviewed the various remedies

<sup>67</sup> 2 ZITELMANN 534.

<sup>68</sup> Swiss Code Obl., art. 55.

<sup>69</sup> French C. C. art. 1384, cf. AMOS and WALTON, Introduction to French Law (Oxford 1935) 259.

<sup>70</sup> N. Y. Vehicle and Traffic Law, § 59.

<sup>71</sup> Masci v. Young (1932) 109 N. J. Law 453, 162 Atl. 623. Similarly, Kernan v. Webb (1929) 50 R. I. 394, 148 Atl. 186, 188.

<sup>72</sup> Young v. Masci (1933) 289 U. S. 253.

introduced in American jurisdictions to supplement the insufficient doctrine of principal and agent, among which, in a few jurisdictions including New York, statutory liability has been imposed on the mere basis of the owner's permission or consent to drive the car into the state. This condition, under any circumstances, secured such due process of law as a nonresident could expect. For the defendant who lent his car to the driver, "subjected himself to the legal consequences imposed by that state . . . as fully as if he had stood in the relation of master to servant."<sup>73</sup>

This line of thought has been transposed into the conflict of laws by the Federal Circuit Court of New York, in a celebrated decision delivered by Judge Learned Hand, in *Scheer v. Rockne Motors Corporation*.<sup>74</sup> An automobile sales corporation of Buffalo, New York, employed a sales agent, Clemens, who took an automobile owned by the firm to Ontario and there caused an accident, supposedly by negligence. The statute of Ontario, taken literally (and probably in its intended meaning), made the owner of the car liable, unless the car was without his consent in the possession of another person.<sup>75</sup> Since Clemens might not have acted within the scope of his employment, the problem was whether the

<sup>73</sup> Mr. Justice Brandeis added that "A person who sets a means in movement whereby injury is inflicted, makes himself liable, whether by responsible agent or an irresponsible instrument." This is an unfortunate confusion of our case of an innocent third person with the cases of tortfeasors acting by an intervening person or by an instrument. On the other hand, 2 BEALE 1297 unnecessarily interprets this passage to the effect that someone who puts an instrument into the hand of a tortfeasor without knowing that it is to be used in another state, should be liable under this state's law.

<sup>74</sup> *Scheer v. Rockne Motors Corp.* (1934) 68 F. (2d) 942.

<sup>75</sup> Two opinions of Canadian barristers on the construction of art. 41 (1), in the Ontario Highway Traffic Amendment Act, 1930, submitted in *Scheer v. Rockne Motors*, *supra* n. 74, contradicted each other.

No other case in point seems to have occurred. However, in the interpretation of the majority in *Thompson v. Bouchier* [1933] O. R. 525, [1933] 3 D. L. R. 119, the intention of the legislature was to impose liability on the owner with whose consent someone else has possession and control of the car. The court excluded the possibility for the owner to evade his liability by parting with the possession and control and renting the car under an agreement whereby the

Ontario statute, if understood in its more rigid meaning, could be applied by the court in New York. The court denied this: "The mere possession of the car did not suffice for Ontario to reach the defendant," and held that, only "if the defendant authorized Clemens to take the car into Ontario, it (the defendant corporation) became liable to the extent contemplated by the statute."

It is well to bear in mind that neither decision dwells on the fact that the law of the place of injury was more severe than that of the defendant's domicil or of another place. If no vicarious liability arose at the place of wrong, none would result from the law of a state in which no harm has been done, whatever this law may predicate.

Finally, the Restatement has concluded the evolution by a general rule (§ 387, comment a):

"In order that the law of the state of wrong may apply to create liability against the absentee defendant, he must in some way have submitted himself to the law of that state. It is sufficient if he has authorized or permitted another to act for him in the state in which the other's conduct occurs or where it takes effect. . . . For analogous situations involving this problem see §§ 343 and 344" (referring to cases of contracts made on the authority of a third person).<sup>76</sup>

This "analogy" is a delicate point. The Anglo-American doctrine of the master's liability for torts committed by his servant has been established traditionally on the assumption of an authority, but this assumption is fictitious and not really observed. Whatever is within the scope of the employment is covered by the liability, even though it may strictly run

other person should comply with all duties of care. It would seem that the owner should no more be exempted by an agreement not to drive the car into New York. This broad construction of the statute agrees with the inferences by the New York court (at p. 495) from two older Ontario decisions.

<sup>76</sup> Restatement, comment a to § 387. The black letter text itself is too vague and obscure to be discussed here.

against the express orders of the employer.” To refer to this old fiction confuses our problem the more as contract and tort are essentially different sources of obligation. Where a person grants a power of attorney to contract on his behalf in another state, he fulfills an essential requirement for his becoming a party to the contract; sending his agent to Rome, he may be supposed to do as those in Rome do; it is reasonable, in this case, to argue that he has, in some sense, submitted himself to the law of the foreign state. The case of apparent authority implied by the principal’s conduct, is “analogous.” But regulations of traffic on highways and the corresponding imposition of liabilities are in no sense dependent on the consent of private persons. Only the historical connection of vicarious liability with the doctrine of master and servant has induced an enlarged concept of “agency,” broad enough to destroy its proper meaning. Judges Brandeis and Learned Hand had still to break a path for the recognition of foreign liabilities beyond the acts of a servant committing a tort within the scope of his employment. Their opinions have to be read in this historical connection and to the affirmative effect. Judge Hand took care to express that it did not matter whether the car owner knew the law of Ontario and thus plainly accepted the risk of liability under the Ontario statute. Not that he submitted himself to the foreign law but that his conduct was a contributory cause of the injury, was the basis of the New York judgment. It may perhaps be asked why the mere fact of entrusting the car to somebody else could not be equally regarded as sufficient.

In no case, however, is the problem concerned either with agency proper, which requires a legal transaction on behalf or on account of the principal, or with the proper concept of instrumentality which presupposes that the third person himself is a tortfeasor. The idea of the Restatement that a

<sup>77</sup> See WEIGERT, 4 *Rechtsvergl. Handwörterbuch* 53.

state could not make any private person liable for a tort committed on its own territory, unless this person submitted himself to this state, is antiquated. The old and universal liability of the owners of vessels for collisions, irrespective of their consent to anything, not to speak of the ancient liabilities for slaves and cattle, should have been a warning. A county court in Pennsylvania has correctly held that the resident owner of a dog was absolutely liable for the dog's biting a person thirty miles away in New Jersey, in accordance with the New Jersey law and regardless of negligence required at the forum.<sup>78</sup> Moreover, the Restatement admits that the law of the place of wrong decides whether an actor, at the time of the injury,<sup>79</sup> is acting within the scope of his employment,<sup>80</sup> and whether an acting person is an independent contractor or a servant.<sup>81</sup> It would seem logical that the same law should determine whether a car owner has permitted his wife to use the car; what the circumstances are under which a car owner is deemed to permit his wife or son the use of the car; and whether the permission of use must refer to the particular state or only to foreign states in general, or whether the simple abandonment of "possession" suffices (as seemingly in the Ontario statute). If the foreign state's jurisdiction or law really depended upon a consent of the party, its court would have to consult his domiciliary law respecting the existence of this premise. Indeed, Zitelmann, who developed a line of thought similar to the two American decisions,<sup>82</sup> considered vicarious liability governed by the personal law of the third person.

Reducing the overextended and oversimplified rule of

<sup>78</sup> *Fischl v. Chubb* (1937) 30 Pa. D. & C. 40; Note, 51 Harv. L. Rev. (1938) 738.

<sup>79</sup> Followed, *Venuto v. Robinson* (C. C. A. 3rd 1941) 118 F. (2d) 679, per Goodrich, J.

<sup>80</sup> Illustrations 1 and 2 to Restatement § 387.

<sup>81</sup> Illustration 3 to Restatement § 387.

<sup>82</sup> 2 ZITELMANN 541.

the Restatement again to the original thought, there remains the constitutional limitation asserted by the Supreme Court, and, as the result of the New York decision, a public policy disapproving of foreign liability for risk, unfair to an absentee. But there are few, if any, foreign types of liability to be feared. Nowhere is a car owner made liable without any possibility of exemption.<sup>83</sup> There exists a broad risk liability under a German law<sup>84</sup> and a severe liability established by the French Court of Cassation for any injury by an "inanimate thing" (C.C. art. 1384) except when it is proved that the injury was unavoidable or caused by concurrent fault of the injured,<sup>85</sup> yet in both cases not the car's owner as such is liable but its "custodian" (*Halter, gardien*) i.e., a person exercising all care, supervision, and factual disposition of the vehicle. An American firm sending its car to Algiers to be used there by an employee at his discretion would be liable for the latter's negligent acts as master of a servant but not because of the use of the "inanimate thing."

Thus, the case of the Ontario statute is rather infrequent. Even in this case, it has been pointed out that liability for transferring a dangerous object to another does not appear extraordinary.<sup>86</sup> There is much to be said for this view. Vicarious liability, in general, has often been conceived as a special application of the doctrine that risk connected with an enterprise should be borne by the person entertaining the enterprise. Who has the profit should have the loss, on the principle of acting at one's own peril—a classical principle of English law, lately recognized on the continent.<sup>87</sup> A principal's liability for his servant has usually been justified

<sup>83</sup> See RHEINSTEIN, 4 Rechtsvergl. Handwörterbuch 82 No. 2.

<sup>84</sup> German Law of May 3, 1909 on traffic of motor vehicles.

<sup>85</sup> Cass. (civ.) (July 29, 1924) BESSIÈRES, S.1924.1.321, D.1925.1.5; Plenary Decision of the United Chambers (Feb. 13, 1930) D.1930.1.57.

<sup>86</sup> GOODRICH 236 § 95.

<sup>87</sup> WIGMORE, "Responsibility for Tortious Acts: Its History," 7 Harv. L. Rev. (1894) 315, 383, 441 at 454, and n. 4. On the various modern theories,

in this way, and so it may also be explained why an acquirer of a house in France becomes immediately liable for purely accidental injuries caused by a collapse of the house.<sup>88</sup> No one will doubt that this liability extends to foreigners.

Applying the law governing the wrong to the accessory liability of third persons affords, in the eyes of the German Supreme Court, the additional advantage of consistency in deciding, under one law, the obligations of both the tortfeasor and his joint debtor in relation to the injured party.<sup>89</sup> Also the assessment of indemnity and contribution between the codebtors will be facilitated thereby, although, of course, the internal recourse of one debtor against his faulty associate is governed, according to its source, by the law governing the employment contract, the bailment, the parental, or any other underlying relation.<sup>90</sup>

(c) *Other effects of public policy.* While the New York Court has narrowed the application of a foreign tort law for the sake of public policy, the Connecticut Court has enlarged the extraterritorial effect of a statute abnormally. A statute in the latter state provides that "any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle. . . ." The court applied the provision to an injury occurring outside the state, by the construction that the statute formed a part of every contract.<sup>91</sup> Thus, by an unprecedented, broad statutory li-

see YOUNG B. SMITH, "Frolic and Detour," 23 Col. L. Rev. (1923) 444, 453, 455.

UNGER, *Handeln auf eigene Gefahr* (1904) initiated an extensive literature.

<sup>88</sup> See the commentaries on French C. C. art. 1386.

<sup>89</sup> German RG. (July 1, 1896) 37 RGZ. 181; LEWALD 268; RAAPE 226.

<sup>90</sup> BARTIN, 2 *Principes* 432.

<sup>91</sup> *Levy v. Daniels' U-Drive Auto Renting Co.* (1928) 108 Conn. 333, 143 Atl. 163. Notes, 29 Col. L. Rev. (1929) 210; 42 Harv. L. Rev. (1929) 433; 27 Mich. L. Rev. (1929) 462; 77 U. of Pa. L. Rev. (1929) 410. The New York Statute has not been applied to injuries in other states, *Miranda v. Lo Curto* (1928) 249 N. Y. 191, 163 N. E. 557.

ability of the bailor to third party beneficiaries and its extraordinary extension to foreign injuries, the injured person acquires a new and unexpected right. This decision has been benevolently discussed by thoughtful writers under the supposition that a true and better justification of the statute is that it may have been regarded as intended to induce renting companies to select their customers carefully.<sup>92</sup> But, if so, why should not a dealer selling cars be subjected to a similar educational policy? There does not seem to exist any urgent reason for interfering with conflicts law by unusual local policies.

The famous rejection of the foreign liabilities of a ship-owner for the negligence of a compulsory pilot in *The Halley* and by the Reichsgericht<sup>93</sup> have been ironically illuminated by the English Pilotage Act of 1913, which introduced such liability into the English law, and the Brussels Convention of 1924 on the liability of owners of seagoing vessels, which provided for liability in case of definitive international arrangements.

## 8. Damages for Tort

At common law, the right to damages was regarded as a remedy subject to the law of the forum,<sup>94</sup> with the questionable justification that it is a *general* right to recover such damages as the court may choose to give. At present, however, excepting some doubts in England, prevailing opinion,

<sup>92</sup> STUMBERG 184ff; HANCOCK 238.

<sup>93</sup> *Supra* p. 242; see ROBERTSON, 4 Modern L. Rev. (1941) 33 n. 35.

<sup>94</sup> England: See, for example, *Baschet v. London Illustrated Standard Co.* (1900) 1 Ch. D. 73 (infringement of French copyright in France).

United States: MINOR 488; *Dorr Cattle Co. v. Des Moines Nat'l Bank* (1904) 127 Iowa 153, 98 N. W. 918, 102 N. W. 836, but evidently the court disapproved of the Illinois liberal rule on credit damages, cf. ROBERTSON, Characterization 269; for other cases see Note, What Law Governs the Measure of Damages? 14 Minn. L. Rev. (1930) 665, 669 n. 17.



abroad<sup>95</sup> as well as in this country,<sup>96</sup> does not hesitate to include the right to damages in the substance of the tort obligation or, for that matter, of any obligation. Accordingly, the law of the place of wrong governs the problem universally and in all respects. As Holmes stated in a famous dictum, the law of the place of the act, "only source" of the obligation for tort, "determines not merely the existence of the obligation but equally determines its extent,"<sup>97</sup> or, without the peculiar note reminiscent of the vested rights theory, "the measure of damages for a tort is determined by the law of the place of wrong."<sup>98</sup> The great weight of Anglo-American authority supports this doctrine.<sup>99</sup>

Thus the Minnesota court has awarded damages superior to the amount recoverable under the law of the forum, for wrongful death in an accident in Montana.<sup>100</sup> In Connecticut, damages for a tort committed in New York have been regarded subject to New York law.<sup>101</sup> "Remoteness" of damages finds the same treatment.<sup>102</sup> In case a sailor has been negligently killed in Dutch waters, a Belgian court awards damages, estimating the circumstances and excluding funeral expenses in accordance with Dutch law.<sup>103</sup> Damages for non-

<sup>95</sup> BARTIN, 2 *Principes* 407 § 336.

Canada: Mr. Justice Duff in *Livesley v. Horst* [1924] S. C. R. 605, [1925] 1 D. L. R. 159, construing *Cope v. Doherty* (1858) 2 De G. & J. 614, 44 Eng. Re. 1127; cf. HANCOCK 123.

<sup>96</sup> See SEDGWICK, 1 *Measure of Damages* (ed. 9) § 1373; WHARTON §§ 427a, 478c.

<sup>97</sup> *Slater v. Mexican Nat'l R. Co.* (1904) 194 U. S. 120, 126.

<sup>98</sup> *Restatement* §§ 412, 414, 415, 417, 419, 421.

<sup>99</sup> More recently, e.g., *Rauton v. Pullman Co.* (1937) 183 S. C. 495, 502; 191 S. E. 416, 419; *Wynne v. McCarthy* (C. C. A. 10th 1938) 97 F. (2d) 964, 970 with references; *Smyth Sales v. Petroleum Heat & Power Co.* (1942) 128 F. (2d) 697, 702 (by Goodrich, J., speaking of tort and contract); 2 BEALE § 412.2; GOODRICH 211 § 88; CHESHIRE 657; HANCOCK, *Torts* 113ff.

<sup>100</sup> *Northern Pacific R. Co. v. Babcock* (1894) 154 U. S. 190.

<sup>101</sup> *Commonwealth Fuel Co. v. McNeil* (1925) 103 Conn. 390, 405, 130 Atl. 794, 800.

<sup>102</sup> See for England, CHESHIRE 657; ROBERTSON, *Characterization* 270.

<sup>103</sup> Trib. Antwerp (Jan. 23, 1936) *Jur. Port d'Anvers* 1936, 197, 36 *Revue Dor* 1937, 158.

pecuniary loss, physical pain, and suffering, as well as for mental anguish, are accorded when granted by the law of the place of wrong, irrespective of the *lex fori*.<sup>104</sup>

*Influence of lex fori.* But the last mentioned problem has sometimes been treated in another way. Although such types of damage as were not foreseen at the place of wrong will be refused, recovery has also been denied in the converse case where they were alien to the law of the forum. How much does public policy interfere in this matter? Pure penalties, certainly, may not be awarded on the ground of a foreign law.<sup>105</sup> But a statute providing for recovery of exemplary damages "is not a penal law."<sup>106</sup> Nor are statutory provisions that include pecuniary recovery, inestimable loss, and compensation for injured feelings, in a lump sum ("*penance*," "*satisfaction*," "*Busse*"<sup>107</sup>). An amount fixed in a death statute for all cases represents "the legislature's approximate estimate of reasonable compensation" and is enforceable in other states.<sup>108</sup> On the ground of a railway or automobile accident in France, damages for "*tort moral*"

<sup>104</sup> *Louisville & N. R. Co. v. Smith* (1909) 135 Ky. 462, 122 S. W. 806; *Texas etc. R. Co. v. Gross* (1910) 60 Tex. Civ. App. 621, 128 S. W. 1173; *Davis v. Gant* (Civ. App. Texas 1922) 247 S. W. 576; *Boyle v. Southern R. Co.* (1901) 36 N. Y. Misc. 289, 73 N. Y. Supp. 465; BEALE § 421.1 p. 1339 n. 8; HANCOCK 118 n. 11, 120 n. 16.

Germany: OLG. Kolmar (April 29, 1913) 6 Rheinische Z. f. Zivil-und Prozessrecht 137.

Scotland: Cf. *supra* p. 241. *Naftalin v. London, Midland & Scottish R. Co.* (1933) S. C. 259 (accident in England, no *solatium*, under Lord Campbell's Bill).

<sup>105</sup> 2 BEALE § 421.1.

<sup>106</sup> *Mr. Justice Brandeis in James-Dickinson Farm Mortgage Co. v. Harry* (1927) 273 U. S. 119, citing *Huntington v. Attrill* (1892) 146 U. S. 657, 666.

<sup>107</sup> Examples are the double and treble damages and fixed monetary penalties, incorrectly refused extraterritorial application in various state decisions, see HANCOCK, Torts 118; Swiss Code Obl., art. 47, "*reparation morale*"; German BGB. § 847 and special laws.

<sup>108</sup> HANCOCK, Torts 119 and n. 13; *Atchison etc. R. Co. v. Nichols* (1924) 264 U. S. 348.

in accordance with French law have been awarded in Austria and Germany.<sup>109</sup>

It should be added that courts may easily find the desired liberty of discretion under almost any rule of the world. Modern legislations without provision for juries, which follow the pattern of the Swiss Code of Obligations,<sup>110</sup> leave the judge a broad margin in appreciating the damage and equitably considering the reciprocal situation of the parties. Even apparently unpliant rules are usually applied in their own jurisdictions with considerable discretion.

The only serious restriction to the rule may result from insufficient procedural machinery at the forum. However, it may be questioned how rigidly the domestic procedure ought to be conceived. The Supreme Court in a famous case<sup>111</sup> has correctly stated that the Mexican law governing the tort obligation would have granted the plaintiffs an annuity that could be judicially modified under circumstances, while the law of Texas, the forum, provided a lump sum, and that the court had to follow the conflicts principle and hence not award a lump sum. Nevertheless, by the determination that the Texas court had no power to make and superintend a decree such as the Mexican law prescribes, and the consequent dismissal of the suit, both the assumption of jurisdiction and the conflicts rule were practically frustrated. So long as courts must stumble over limitations on their power and narrowly construed procedural rules, adjustment

<sup>109</sup> Austria: OGH. (Nov. 2, 1910) GIU. NF. 5219.

Germany: OLG. Kolmar (April 29, 1913) 6 Rheinische Z. f. Zivil-und Prozessrecht 137.

Similarly, France: BARTIN, 2 Principes 409.

<sup>110</sup> Swiss Code Obl., arts. 43, 44 par. 2.

Mexico: Código Penal, art. 31 par. 1.

Thailand: C. C. art. 438 par. 1.

China: C. C. art. 218.

<sup>111</sup> Slater v. Mexican Nat'l R. Co. (1904) 194 U. S. 120.

of the machinery necessary for reciprocal application of laws is severely impaired. Why should any American court not be directed by its legislature to render decrees which Mexican courts are able to issue and which are perfectly similar to alimentary decrees familiar to this country? Under the constitutional conceptions of most other countries such doubts do not even appear. Otherwise, the characterization of damages as a problem of procedure, wrong as it is, would have a great practical advantage!

How simply the problem can be internationally managed, is illustrated by the Warsaw Convention on International Air Transport concerned with the converse case. In the carriage of passengers, liability of the carrier is limited to the sum of 125,000 francs. "Where in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs."<sup>112</sup>

## 9. Other Sanctions

Apart from damages, the effects of a tort may consist in a declaratory judgment or exemplary damages, specific restitution ("*in integrum*," "*in natura*"), and restraint from continuance or repetition. A lively discussion in France has been concerned with the interprovincial treatment of "*astreinte*," i.e., an order to pay a sum periodically so long as the cause of damage continues or so often as the cause is reiterated. Was this kind of judgment, developed in the French courts, to be applied in the case of a tort committed in France proper, by a court of Alsace-Lorraine where alongside of French private law German civil procedure was in force?

<sup>112</sup> Art. 22, 1, HUDSON, 5 Int. Legislation 100 at 112. We may also point to the treatment of damage in admiralty proceedings *infra* Chapter 27, p. 353.

The literature has recognized the "*astreinte*" as substantive despite its origin in the courts and enabled the plaintiff to elect this relief, in addition to direct enforcement provided by the procedural local law.<sup>113</sup>

Also, all other forms of injunctive decrees or judgments serve special purposes of the substantive right and should be granted, on principle, on the basis of the law governing tort. Thus, such specific reparation as recovery of an unlawfully opened letter, public revocation of a public libel, reemployment of a worker improperly dismissed, may be decreed, unless the machinery of the forum is really unable to accommodate itself to the task.

#### 10. Relation to Procedural Law

(a) *In general.* In the traditional view, conflicts law provides for the application of rules and standards of the state considered most closely connected with the legal relations of the parties; but by what steps and in what order of activities the rights and duties thus created are to be enforced, is the object of the procedural law of the forum. This apparently simple distinction between "substance" and "procedure" has more recently revealed its difficulties in incipient special investigations; it has been materially affected, on the other hand, by a gradual reduction of the large scope assigned to procedure in the Anglo-American courts. The Restatement started with the orthodox principle, yet it seems to concede considerable space to the application of foreign law, though its statements, vague and contradictory,<sup>114</sup> testify to the draftsmen's uneasiness. In fact, among the various problems involving demarcation between foreign substantive law and

<sup>113</sup> See the description of the controversy by J. DONNEDIEU DE VABRES 589, 590.

<sup>114</sup> Restatement §§ 584ff.; criticized by MORGAN, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1945) 153ff.

the procedure of the court seized of litigation, few are ripe for solution, and not a few arguments of contemporary discussion are debatable. The well-justified tendency to enlarge the domain of the applicable foreign law, indeed, should not be exaggerated. One would think that an Anglo-Saxon institution such as the bipartition of judicial functions between judge and jury is an exclusive concern of the forum. Despite all the influence on the decision of cases exercised by jury verdicts or by the different mentalities of learned judges and laymen,<sup>115</sup> the modes of organizing matters of procedure, are a part of the administration of justice. Conflicts law does not purport to counterbalance all the differences of countries and courts. We have to be satisfied with presenting to the court the requisites of the cause of action ("substance") and the final request in the form most similar to that in a court of the state referred to. A party seeking redress for a tort or even defending in a state where the tort has not been committed, must be content with the machinery and the habits of the forum in finding the facts. Nobody could seriously insist on the privilege of having a jury decide his case, despite any guarantee furnished at the *locus delicti*, if the forum does not allow a jury in his case. Theoretically, the two questions involved are rather simple and seem well-known to the courts. The first question concerns the set of facts forming the cause of action; this set is determined by the law governing the tort. Thus, if the plaintiff's alleged conduct, under the statutes and authorities of the foreign place of wrong, constitutes contributory negligence barring relief, the forum takes over the foreign qualification of this conduct as a part of the applicable substantive law.<sup>116</sup> The

<sup>115</sup> On this point, after a most interesting discussion of the cases, MORGAN, *supra* n. 114, at 171 is hesitating. He believes in a balance of arguments and refrains from advising the courts whether the forum should conform to the foreign rules concerning the use of the jury.

<sup>116</sup> Wieden v. Minneapolis, St. Paul etc. R. Co. (1930) 181 Minn. 235, 238; 232 N. W. 109, 110; Smith v. Brown (1939) 302 Mass. 432, 433, 19 N. E.

second question, procedural under all theories, is that of ascertaining the facts, and judging them according to the foreign standard. It is naturally the law of the forum that decides whether a jury is to be charged and how the verdict is to be framed.

Of course, there are difficulties inherent in the distinction between facts and law; they are enhanced by the subtle shades of distinctions concerning verdicts in the courts of this country. However, these difficulties would be considerably aggravated by their transfer into conflicts law. Maintaining the principle that the applicable law is that of the place of wrong and that the ascertainment of the facts pertains to the procedure of the court, including the intervention and direction of a jury, the task of the forum will be facilitated rather than involved.

(b) *Burden of proof.* At civil law, distribution of the burden of proof, always understood as fixing the burden of persuading the courts, is sharply distinguished from trying of evidence, and is considered substantive law in every regard.<sup>117</sup> Therefore, no one doubts that a rule, under which a plaintiff suing a railway for injury is relieved from the burden of showing the defendant's negligence, belongs to the law governing the wrong.<sup>118</sup> This is the more readily acknowledged, as this lightening of the plaintiff's task is commonly

(2d) 732, 733 and later decisions of the Massachusetts court, see MORGAN, *supra* n. 114, at 166. The decision in *Pilgrim v. MacGibbon* (1943) 313 Mass. 290, 47 N. E. (2d) 299 seems to apply the same principle, advocated here: the Nova Scotia law of the place of the accident, including judicial decisions defining gross negligence in a comparable case, determines whether a given set of facts does or does not constitute gross negligence, requisite of an action of a gratuitous passenger; the law of procedure, however, determines whether there is sufficient evidence to take the case to the jury on the question whether the defendant conformed to the standard. Similarly, *Gregory v. Maine Central R. Co.* (1945) 317 Mass. 636, 59 N. E. (2d) 471, 159 A. L. R. 714.

<sup>117</sup> RG. (April 17, 1882) 6 RGZ. 413.

Switzerland: 16 BGE. 783, 790; 20 *id.* 496; 24 *id.* II 357, 390.

Código Bustamante, arts. 398, 401.

<sup>118</sup> 2 BAR 383; 2 ZITELMANN 253; DIENA, 2 Princ. 399; MEILI-MAMELOK, IPR. 403; 1 FRANKENSTEIN 363; NUSSBAUM, D.IPR. 413.

felt to rest half way between the traditional liability for negligence and the modern cases of absolute liability. It may be construed either as a qualified liability for fault or as a moderated liability for risk.<sup>119</sup> One of the most powerful reasons for reforming the law of tort was the experience that victims of business carried on by big and complexly organized enterprises are unable to identify the source of harm somewhere in the central or local machinery responsible—an “emergency of evidence.”<sup>120</sup> This difficulty may be overcome by reversing the roles and presuming the negligence, without entirely eliminating the requirement of fault.

Not all “presumptions” have an analogous meaning, but they are generally deemed to present rules modifying the burden of proof.<sup>121</sup> *Prima facie* cases, however, are often believed to pertain to the procedural field of evidence. But this does not agree, for instance, with the universally settled practice in maritime tort cases, that navigation contrary to the local port or river regulations amounts to negligence by an average experiential conclusion (*prima facie* case), so long as the assumption of fault is not deprived of its empirical value of counterproof. The evidence that the defendant vessel has followed the wrong side of the road or shown red instead of green lights, replacing until counterproof the evidence of negligent navigation, reverses the burden of proof for negligence, quite as a legal presumption *de facto* does; the judge need not be convinced of the truth of negligence, because this additional fact is supplied by experience.<sup>122</sup> Likewise, negligence is assumed from the breach of a statu-

<sup>119</sup> TITZE, 6 Rechtsvergl. Handwörterbuch 681.

<sup>120</sup> “Beweisnotstand,” ADOLF EXNER, *Der Begriff der höheren Gewalt (vis major)* (1883) esp. 46, 50.

<sup>121</sup> See, e.g., VON TUHR, *Allgemeiner Teil des Schweizerischen Obligationenrechts* (1924) 142.

<sup>122</sup> RABEL, *Der Prima Facie Beweis*, in *Festheft für Adolph Wach*, 12 *Rheinische Zeitschrift für Zivil-und Prozessrecht* 428; accord, HEINSHEIMER, 13 *id.* 1.



tory duty, such as the obligation to clean the sidewalk, until a more probable causal connection is shown by expert evidence.<sup>123</sup> In a suit of a guest passenger injured in a territory of German law, a French court even adopted the reduction of proof resulting from the practice of the Reichsgericht, which presumes *prima facie* that any unlawful bodily harm is negligently done.<sup>124</sup>

*American law.* American courts, in the wake of English tradition, have long persisted in allocating all these matters to the broad procedural field of evidence.<sup>125</sup> However, not only are "conclusive presumptions" commonly said to be of substantive nature,<sup>126</sup> but a vigorous trend favors the same characterization for other rules regulating the burden of persuasion.<sup>127</sup> The matter evidently pertains to those slowly shifting from informal preferences of judges hearing evidence to tight rules of law for deciding cases. The New Hampshire court has recognized as a part of the Vermont tort law the rule that the plaintiff has to show his freedom from contributory negligence.<sup>128</sup> In other cases there may be doubt.

<sup>123</sup> Dawson v. Murex, Ltd. [1942] 1 All E. R. 483, C. A.

Germany: RG., JW. 1904, 408; 1909, 687; 1911, 980; 1912, 390 and often since.

<sup>124</sup> App. Colmar (May 29, 1934) Clunet 1936, 626.

<sup>125</sup> Philip L. Gregory v. Maine Central R. Co. (1945) 317 Mass. 636, 59 N. E. (2d) 471, 159 A. L. R. 714.

<sup>126</sup> WIGMORE, Evidence (ed. 3) § 1354, cf. §§ 2483-2491; Restatement § 595 comment c.

<sup>127</sup> See MAGUIRE and MORGAN, "Looking Backward and Forward at Evidence," 50 Harv. L. Rev. (1937) 910; HAWSHAW, "Conflict of Laws as to Presumptions and Burden of Proof," 4 Mo. L. Rev. (1939) 299; HANCOCK, Torts 112, 155. *Rationes dubitandi*, however, have been developed by MORGAN in his important article cited *supra* n. 114, 58 Harv. L. Rev. (1944) at 190ff. On the difficulties wrought by (1) the Federal Rules of Civil Procedure of 1938, (2) the submission of the federal courts to the conflicts law of the state where they sit, see UHL, Note in 37 Mich. L. Rev. (1939) 1249; MORGAN, *op. cit.* at 170ff.

<sup>128</sup> Precourt v. Driscoll (1931) 85 N. H. 280, 157 Atl. 525; accord: Fitzpatrick v. Int'l Railway Co. (1929) 252 N. Y. 127, 169 N. E. 112, cf. KUHN, Comp. Com. 307; Francis v. Humphrey (1939) 25 F. Supp. 1. Cf. LEFLAR, Arkansas Conflict of Laws 198 on the application of the Arkansas statutory presumption against railroad companies.

The Restatement<sup>129</sup> seems to reflect this uncertainty. While it assigns "presumptions" to the law of the forum, it contrasts them with foreign requirements concerning proof of freedom of fault, which are interpreted at the place of injury "as a condition of the cause of action itself, or as affecting the nature or amount of recovery." But the comment adds as explanation, what in reality stands as a well-established rule,<sup>130</sup> that foreign rules shifting the burden of proof should be applied where "the remedial and substantive portions of the foreign law are so bound together that the application of the usual procedural rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate foreign state."<sup>131</sup> This formula evidently is a sign of the present transitory stage in recognizing the substantive nature of permanently fixed presumptions for the purpose of conflicts law. Any rule including a presumption fixing the burden of persuasion, should always be taken as a part of the applicable law,<sup>132</sup> while no such rule can be advocated with respect to other categories of presumptions.<sup>133</sup>

(c) *Conditions of bringing suit.* If the wrongdoer in an automobile accident in Florida has died, the administrator of his estate may be sued in Tennessee despite the domestic rule of this state allowing such suit only in case the wrongdoer has been previously sued in his lifetime.<sup>134</sup>

In a similar way, provisions requiring service of notice

<sup>129</sup> Restatement § 595 and comment a; see also 3 BEALE §§ 595.2, 595.3; GOODRICH 199 § 81; STUMBERG 131; Note, 78 A. L. R. (1932) 883.

<sup>130</sup> Central Vermont R. Co. v. White (1915) 238 U. S. 507; New Orleans etc. R. Co. v. Harris (1918) 247 U. S. 367; Lykes Bros. S. S. Co. v. Esteves (1937) 89 F. (2d) 528, 530.

<sup>131</sup> Restatement § 595 comment a.

<sup>132</sup> But MORGAN, *supra* n. 114, 58 Harv. L. Rev. (1944) at 190, 193, professes grave doubts. On the different meanings in which *res ipsa loquitur* is understood, see PROSSER, "The Procedural Effects of Res Ipsa Loquitur," 20 Minn. L. Rev. (1936) 241.

<sup>133</sup> Approximately to the same effect, MORGAN, *supra* n. 114, at 193.

<sup>134</sup> Parsons v. American Trust & Banking Co. (1934) 168 Tenn. 49, 73 S. W. (2d) 698.

of the claim upon the defendant before suit for damages can be brought, are applicable when part of the law of the place of wrong,<sup>135</sup> irrespective of the law of the forum.<sup>136</sup>

## II. Relation to Contractual Obligations

(a) *Distinction in the municipal laws.* Tort and contract form an antithesis, but historic connections between them still persist, as in the English controversy whether an anticipatory breach of contract may not be a tort, or in the French discussion whether a breach of contract produces an obligation for damages under article 1382 of the Civil Code, the cornerstone of tort recovery. The general view of modern legal science, however, precisely separates tortious and contractual obligations. Each source of obligation is characterized by its own premises and effects. It may be that the facts of a case create a claim in contract and another in tort. The normal rule is that in such case both rights are at the disposal of the injured party<sup>137</sup> in some kind of concurrence. If a tenant wantonly cuts the trees surrounding a rented cottage, the landlord may sue him on the contract or for destructive

<sup>135</sup> *Sawyer v. El Paso & N. E. R. Co.* (1908) 49 Tex. Civ. App. 106, 108 S. W. 718; *Husted v. Missouri Pac. R. Co.* (1910) 143 Mo. App. 623, 128 S. W. 282.

<sup>136</sup> *Contra*: *Arp v. Allis Chalmers Co.* (1907) 130 Wis. 454, 110 N. W. 386 under the theory of a general statute of limitation.

<sup>137</sup> England: POLLOCK, *Torts* 426; WINFIELD, *Text-book of the Law of Tort* (ed. 2, 1943) 717 § 191; SALMOND-STALLYBRASS, *Torts* 8. United States: PROSSER, *Torts* 201ff.

France: Despite great confusion the practice tends to accumulate the benefits for the plaintiffs, as in the case of carrier liability for personal injury, see the critical review by JOSSEAND, *Les Transports* (ed. 2, 1926) § 894 *bis, ter*. and the résumé by ESMEIN in 6 *Planol et RIPERT* 683 § 493.

Germany: 88 RGZ. 317, 433; 89 *id.* 385; 90 *id.* 68, 410; 99 *id.* 103; 103 *id.* 263; 106 *id.* 133. The doctrine followed therein, with its exceptions (*infra* n. 149) was initiated by FRANZ VON LISZT, *Die Deliktobligationen im System des Bürgerlichen Gesetzbuchs* (1898) 12-15.

Italy: Cass. (April 27, 1937) *Giur. Ital. Mass.* 1937, c. 395; App. Milano (Nov. 5, 1937) *Giur. Ital.* 1938 I 2, 53; App. Bologna (April 20, 1938) *Foro Ital. Mass.* 1938 No. 34.

Switzerland: 64 BGE. II 259; 67 *id.* II 136.

waste (Aquilian *culpa*, in other laws). Of course, he cannot request damages twice for the same loss. The concurrence is not "accumulative" in this sense. Sometimes, it is true, there exists reluctance to admit concurrence. Thus, for instance, the Restatement of the Law of Torts, in a modern view,<sup>138</sup> recognizes a tort liability when a lessor of land fails to make repairs that his contract calls for and the lessee is bodily harmed thereby; but it denies that there is a contractual obligation for damages.<sup>139</sup> In a similar thought, the same Restatement carefully states a tort liability for negligence in performing *gratuitously* promised services for the safety of another person, evidently on the assumption that when services are promised for consideration, the contractual claim takes care of the damages and no tort action is given.<sup>140</sup> Such exclusion of rights should be confined to certain narrow common law situations.<sup>141</sup>

Another difference of views concerns the nature of the concurrence. At common law, from the times when the plaintiff had to "waive the tort" for the purpose of suing in assumpsit on a fictitious contract, there seems to exist a strong tendency to think in terms of remedy rather than of rights and to offer the plaintiff the remedies only for his selection. Sometimes, the plaintiff's declaration of choice is even said to be final.<sup>142</sup> In this country, the jurisdictions are divided. At present, however, many courts allow the injured to pursue both actions,<sup>143</sup> and this is the prevailing Continental doctrine.<sup>144</sup> Therefore, the plaintiff is entitled to all

<sup>138</sup> See HARPER, Torts § 103 n. 84.

<sup>139</sup> § 357.

<sup>140</sup> § 325.

<sup>141</sup> On the reluctance of a part of the American courts to recognize that the modern liability of carriers for safe transportation may produce contractual as well as tortious effects, see *infra* p. 291.

<sup>142</sup> See PROSSER, Torts 1127 n. 12. Similar views occur in Latin America, e.g., CARVALHO SANTOS, 3 C. C. Brasileiro, *supra* n. 2, 317 No. 4.

<sup>143</sup> See PROSSER, Torts 202 n. 85; WILLISTON, 6 Contracts § 1528.

<sup>144</sup> Germany: 63 RGZ. 308; 87 *id.* 309; 88 *id.* 317; 88 *id.* 433; 89 *id.* 385;

advantages either remedy may afford him, as to facts to be proved, defenses, joint liability of defendants, statutes of limitation, extent of compensable material damage, reparation of nonpecuniary damage, vicarious liability of third persons, and so forth. In the United States, tort actions as a whole, are considered to be the more advantageous remedies,<sup>145</sup> while they are usually less profitable in Germany.<sup>146</sup>

A similar relation exists with respect to the parties involved. A passenger injured in a railway accident may sue the railway company which sold him the ticket in contract, as well as the company on whose tracks he suffers harm in tort.<sup>147</sup> Or one plaintiff may sue the defendant for tort damages, while another on the same facts claims a breach of contract by the defendant.<sup>148</sup>

On the other hand, if the law of contracts restricts the extent of the promisor's duties, the French and German doctrines definitely infer that he cannot be deemed liable for more under tort law. Also, an English plaintiff is now allowed to disregard any limitation of liability under the contract by alleging a broader liability in tort.<sup>149</sup> For instance, as a gratuitous deposit makes the bailee liable only for fraud and gross negligence under French and German laws,<sup>150</sup> a

90 *id.* 68, 410 etc.

Switzerland: 26 BGE. II 105; 35 *id.* II 424; 37 *id.* II 10; 50 *id.* II 378 *sub* (2).

<sup>145</sup> PROSSER, Torts 1123. A similar opinion prevails in France.

<sup>146</sup> RABEL (*supra* p. 228) 26.

<sup>147</sup> POLLOCK, Torts 432.

<sup>148</sup> POLLOCK, *id.* 437.

<sup>149</sup> England: SALMOND-STALLYBRASS, Torts 9, although not really supported by the case of 1933 cited *ibid.* note (i).

France: Cass. (Jan. 11, 1922) S.1924.I.105 and Note; JOSSEMAN, Les transports (ed. 2) 610 § 628: "La responsabilité contractuelle refoule la responsabilité délictuelle à laquelle elle vient se substituer, . . . du moins dans la mesure où les rapports (des parties contractantes) sont fixés par la convention."

Germany: RG. (June 20, 1916) 88 RGZ. 319, 320 as generally interpreted.

Switzerland: BG. (May 21, 1941) 67 BGE. II 132, 137.

<sup>150</sup> French C. C. art. 1927; German BGB. § 690.

simple failure of ordinary care in the custody is not enough to substantiate a tort action. The American courts that have borrowed from Roman law a similar restriction of the bailee's contractual liability, by the intermediary of Chief Justice Holt's doctrine,<sup>151</sup> are likely to decide in the same manner on the tort aspect in the absence of statute, on the theory that the creditor has assumed the risk.

(b) *Conflicts law*. Obviously, on principle, conflicts law ought to follow the described conceptions prevailing in the modern municipal laws that tort and breach of contract generate two independent and concurrent rights, also when the supporting facts (excepting the existence of the contract) are identical. The correctness of this proposition is even more self-evident when the causes of action arise from a tort committed in one jurisdiction and from the breach of a contract governed by the law of another jurisdiction.<sup>152</sup> In further conformity with this general approach, the injured may combine both actions, unless the court following procedural rather than substantive considerations, restricts the plaintiff to a choice between the causes of action.

The American cases, unfortunately, lack consistency, but they seem to approach the same result. Apart from workmen's compensation, to be discussed separately, they are mainly concerned with railway and carrier liability.

Injury inflicted on a passenger in railway accidents has always been held sufficient as a possible ground of tort. Several courts, however, following the lead of the New York Court of Appeals, have awarded damages on the ground that the plaintiff entered into a contract with the railway

<sup>151</sup> *Coggs v. Bernard* (1704) 2 Ld. Raym. 909, 92 Eng. Re. 107; PROSSER, *Torts* 257.

<sup>152</sup> This argument has been pointed out by BARTIN, 2 *Principes* § 335. For Germany the obvious result has been briefly mentioned by M. WOLFF, *IPR.* 92 § 26 I.

whose ticket he bought.<sup>153</sup> Thus, the contract was a protection to the plaintiff, in the New York court, in a case in which the tort action was barred by statutory limitation at the place of wrong,<sup>154</sup> as also in a Texas case where the tort action was frustrated by the plaintiff's failure to give notice of his claim under the law of New Mexico, while the contractual claim was independent of this failure according to the law of Pennsylvania.<sup>155</sup>

The contrary leading case of *Pittsburgh Railway v. Grom*<sup>156</sup> contends that "the duty of the carrier to use proper care in the transportation of the passenger is one imposed by law, and the right of action grows out of the liability which the law imposes rather than out of the contract of transportation." The court construed this contract as evidenced by the ticket which contained no express promise of care or to transport the passenger in safety. We are, thus, in the continued presence of an ancient theory, which is evidently also connected with the idea that the tort is exclusively committed at the place where the injury occurs.<sup>157</sup> More advanced thinking has realized that the ordinary carrier's liability at common law also presupposes a contract of transportation, is implied in the contract, has to be read into it. The modern development needs a clear vision of the contractual fundament of accessory duties. It goes even farther, by acknowledging also the contractual ties between the customer and ulterior carriers.

It is interesting to compare with both views the international conventions on carriage of goods, and more recently also on transport of passengers, which support "actions arising out of the transport contract" against the railway of dispatch

<sup>153</sup> See HANCOCK, Torts 192, 193. ROBERTSON, Characterization 182 seems to advocate the same solution.

<sup>154</sup> *Dyke v. Erie R. Co.* (1871) 45 N. Y. 113.

<sup>155</sup> *Sawyer v. El Paso etc. R. Co.* (1908) 49 Tex. Civ. App. 106, 108 S. W. 718.

<sup>156</sup> *Pittsburgh etc. R. Co. v. Grom* (1911) 142 Ky. 51, 133 S. W. 977.

<sup>157</sup> *Infra* Chapter 26 pp. 302f.

or departure, respectively, the railway of destination, and "the railway on which the cause of action arose."<sup>158</sup> The last mentioned action, despite its possible connection with the contract, is visibly based on tort.

An extreme variety of treatment appears in the cases concerned with misdelivery or delayed delivery of goods by carriers or of messages by telegraph companies, dating from the period before federal legislation regulated a large part of such business. The courts have referred to the law of the place of contracting, to that of performance, or to the law of the place of wrong, which again has been found either at the place where prompt and correct delivery should have been made or at the place where the negligent acts were done.<sup>159</sup> The Restatement does not even mention contractual actions in this connection. The apparent inconsistency of the courts may be explained in part by their desire to help the plaintiff, because he lacks the benefit of the option that he ought to have. In the telegram cases of Arkansas, Leflar has demonstrated how this benevolence has been manifested in a striking manner. In order to allow recovery under Arkansas law, which annulled clauses exempting the telegraph company from liability, the Arkansas courts applied their own law as the law of contract to outgoing messages and as the law of the place of wrong when the delivery had to be made in the state.<sup>160</sup>

The liability of employers for injury suffered by their employees, before the workmen's compensation legislation came into force, was clearly determined. The employee had

<sup>158</sup> International Convention concerning the Transport of Goods by Rail, Rome, Nov. 23, 1933, art. 42 § 3, 192 L. of N. Treaty Series 391, 443, HUDSON, 6 Int. Legislation 527, 554.

International Convention concerning the Transport of Passengers and Luggage by Rail, Rome, Nov. 23, 1933, art. 42 § 2, 192 L. of N. Treaty Series 329, 361. HUDSON, *id.* 568, 582.

<sup>159</sup> See HANCOCK, Torts 194-198 and résumé 199.

<sup>160</sup> LEFLAR, Arkansas Conflict of Laws 188 § 78.



the choice between the law governing the employment contract and the tort action governed by the law of the place of the accident. The courts maintained this liberal attitude in regard to the fellow servant doctrine and its counterparts; even if in the state whose law governed the employment the common law doctrine still barred suits on the contract as well as for the tort, the courts of this same state awarded tort damages upon the foreign law of the place of tort.<sup>161</sup>

*Stipulations for exemption from liability.* Agreements "contracting out" or limiting the responsibility for tort, if they are not covered by international agreement, ought to follow appropriate conflicts principles concerning contracts. In fact, in the United States the question whether future personal injury claims can be reduced by agreement between a passenger and a transportation enterprise, is usually treated as a contract problem, although the claims themselves are regarded as tort claims.<sup>162</sup>

Thus, the law governing a contract clearly is competent to answer the question whether a stipulation generally exempting the debtor from future liability is to be construed as including his responsibility under the theory of tort. Under the same rule, a waiver by which a debtor is released from his existent obligation arising out of tort, must be judged according to its own merits rather than to the law of the place of wrong. But the main problem, of course, is that concerning the permissibility of exemption clauses. This problem, commonly complicated in the courts by a rivalry between the law governing a contract and the public policy of the forum, may entail more difficulties when the law of the place of wrong prohibits an anticipatory renunciation of

<sup>161</sup> For cases see HANCOCK, Torts 207 n. 3.

<sup>162</sup> Conklin v. Canadian Colonial Airways, Inc. (1935) 266 N. Y. 244, 194 N. E. 692; Oceanic Steam Navigation Co. v. Corcoran (1925) 9 F. (2d) 724. England: Jones v. Oceanic Steam Navigation Co. [1924] 2 K. B. 730. Quebec: C. P. R. v. Parent (1914) 24 Que. K. B. 193.

responsibility for tortious negligence. Consistency and convenience require that the law governing the agreement should prevail.

## 12. Statutes of Limitation

In civil law countries the principle of the place of wrong extends, as a matter of course, to those limitations upon the time for bringing the action, that are regarded as a part of the substantive law of the place of wrong.<sup>163</sup> The same ought to be recognized in American law.<sup>164</sup>

The well-known difficulties, however, existing in this country with respect to general statutes of limitation, classified as procedural, make themselves felt in this matter. European courts, nevertheless, no longer hesitate to apply English and American limitations of this kind as a part of the English or American tort law, although some courts prefer their own periods of limitation if they are shorter than the foreign one.<sup>165</sup> Certain American statutes barring suits upon an obligation barred by its proper law take the right way, provided they are not of the kind of the Wisconsin statute

<sup>163</sup> The problem has prevailingly been treated with respect to contracts, but is general. See FICKER, 4 *Rechtsvergl. Handwörterbuch* 386.

A problem of international procedural law concerning foreign torts has been discussed in two German cases, OLG. Stettin (Dec. 5, 1929) JW. 1930, 1882, IPRspr. 1930, No. 151, and OLG. Hamburg (Oct. 18, 1929) Hans. RGZ. 1930 A 682, IPRspr. 1930, No. 115; *aff'd*, RG. (July 8, 1930) 129 RGZ. 385, IPRspr. 1930 No. 156: An action brought at the foreign place of tort interrupts the period of limitation at the forum running for a German tortfeasor (significant under art. 12 of the German EG. BGB.) only if the judgment of the foreign court would be recognized as binding at the forum. *Contra*: correctly, NEUMEYER, JW. 1926, 374.

<sup>164</sup> According to the usual formula, a statute extinguishing the plaintiff's right is applicable. More appropriate rules appear in the frequent statutes against entertaining foreign suits barred by the applicable law. See Note, 75 A. L. R. 203; HANCOCK, *Torts* 136, 137.

The limitation of twelve months for tort actions arising from accidents, under Lord Campbell's Act in England, has been applied, as the ground of action "entirely arose in England", *Goodman v. London R. Co.* (1877) 14 Scot. L. Rep. (1877) 449, 450.

<sup>165</sup> *Cf.* Vol. I, pp. 64, 66.

declaring that a claim for personal injuries shall be barred by the *lex loci delicti* "unless the person so injured shall, at the time of the injury, have been a resident of this state."<sup>166</sup> This, indeed, is an illogical<sup>167</sup> and narrow-minded public policy.

The topic is too broad to be discussed at this juncture.

### 13. Industrial Property

(a) *Territorial limitation of protected interests.* Patents are granted in every state for the territory of the state only. Hence, the rights accorded by a patent cannot be violated outside the state.<sup>168</sup> The same is true with respect to trademarks<sup>169</sup> and designs,<sup>170</sup> barring the cases in which imitation constitutes liability for unfair competition. The existing international unions and treaties in these matters intend to assure these territorially limited rights to foreigners.

If, however, such a right is tortiously invaded in the territory where it is protected, a claim for damages on this ground may well be brought in a foreign court having jurisdiction over the defendant.<sup>171</sup>

(b) *Unfair competition.* Being of a different nature, liability arising from unfair competition is not bound to a certain territory. The law of the jurisdiction in which the competi-

<sup>166</sup> See 48 L. R. A. (1900) 639; 4 L. R. A. (N. S.) (1906) 1029; 51 *id.* (1914) 96; L. R. A. 1915C, 976.

<sup>167</sup> AILES, "Limitation of Actions and the Conflict of Laws," 31 Mich. L. Rev. (1933) 474, 501.

<sup>168</sup> German RG. (Oct. 15, 1892) 30 RGZ. 52; WEISS, 4 Traité 502; HERM. ISAY, Patentgesetz (ed. 6, 1932) 230.

<sup>169</sup> United States: Vacuum Oil Co. v. Eagle Oil Co. (C.C.D.N.J. 1903) 122 Fed. 105 and (C.C.D.N.J. 1907) 154 Fed. 867, 869.

France: PICHOT, 9 Répert. 120 No. 111.

Germany: RG. (Sept. 20, 1927) 118 RGZ. 76 (against previous practice); (April 20, 1928) JW. 1928, 1456; RG. (July 1, 1930) 129 RGZ. 385, IPRspr. 1939 No. 156.

Italy: DE SANCTIS, 18 Rivista (1926) 127, 132.

<sup>170</sup> WEISS, 4 Traité 509.

<sup>171</sup> RG. (July 8, 1930) 129 RGZ. 385, against former cases, see NUSSBAUM, JW. 1931, 428.

tion occurs, governs the claim. When the Swiss Federal Council submitted the draft of the Swiss Law of 1943 on Unfair Competition to the parliament, it said: the law applies according to the general principles of conflicts law, that is, according to the law of the place where the wrong is committed, as well as by analogy to arts. 3ff. of the Penal Code. If an act of unfair competition is committed in Switzerland, this law applies. Hence, it applies also in case the act has effects not only on the Swiss market but also on a foreign market; the Swiss and foreign competitors are equally entitled to sue. This solution conforms to the obligations assumed by Switzerland in the Convention of Paris, of March 20, 1883.<sup>172</sup>

The case of unfair competition alleged to have been committed by the use of a trade-mark is of particular interest. The practice of the federal courts in the United States has been recently clarified. The courts have taken jurisdiction and granted injunctions when a fraudulent scheme of unfair competition was carried out in essential part in this country, such as when upon a conspiracy undertaken in this country, barrels were sent unmarked from American ports and then marked abroad with the plaintiff's brand.<sup>173</sup> A complainant protected by an American trade-mark is also granted relief against a competitor who uses the mark in the United States for export to another country in which the complainant is likewise entitled to a trade-mark right against the respondent.<sup>174</sup> But if in the foreign country the defendant himself has the trade-mark right, the employment of the mark which will be consummated in this foreign country is

<sup>172</sup> MESSAGE, 1942, *ad* C III 3 p. 19, see O. A. GERMANN, *Concurrence déloyale* (Zürich 1945) 134.

<sup>173</sup> *Vacuum Oil Co. v. Eagle Oil Co.* (C.C.D.N.J. 1907) 154 Fed. 867, *aff'd* (C.C.A. 3d 1908) 162 Fed. 671; *cert. denied* 214 U. S. 515.

<sup>174</sup> *Hecker H-O Co. v. Holland Food Corp.* (C.C.A. 2d 1929) 36 F. (2d) 767, as commented on or rather corrected in *Luft v. Zande*, next note.

not considered to constitute unfair competition.<sup>175</sup>

The German Supreme Court, however, which had followed somewhat similar lines,<sup>176</sup> more recently favors the application of its own domestic rules by multiple devices, on the assumption that the German rules repressing unfair maneuvers are particularly exacting. One principle held is that a plaintiff, having his principal establishment in Germany, can sue under German law, because his suffering damage there has constituted the forum a place of wrong.<sup>177</sup> Later decisions advance the idea that, if both parties are of German nationality or domicile, they have to observe also in their foreign activities the mutual duties flowing from honesty of business as prescribed in the German law.<sup>178</sup> Finally, places of wrong have been construed in Germany and Italy on various theories.<sup>179</sup> The Dutch courts have resisted the temptation to adulterate the principle for any such reasons,<sup>180</sup> but National Socialist writers made capital out of the nationalistic elements of the Reichsgericht decisions.<sup>181</sup>

<sup>175</sup> *George W. Luft Co. v. Zande Cosmetic Co.* (C.C.A. 2d 1944) 142 F. (2d) 536, 540. On the difficulties of determining whether a federal court has to follow on this subject state conflicts rules, see also Kerner, J., in *Philco Corp. v. Phillips Mfg. Co.* (1943) 133 F. (2d) 663, and the annotation by SCHOPFLOCHER, Conflict of laws with respect to trademark infringement or unfair competition, including the area of conflict between federal and state law, 148 A. L. R. 139.

<sup>176</sup> See RG. (June 5, 1928) *Markenschutz und Wettbewerb* 1927/28, 491ff.; (March 31, 1931) JW. 1931, 1904.

<sup>177</sup> Decisions from 18 RGZ. 28, 31 (1886) to 108 RGZ. 9 (1923); see MELCHIOR, 5 *Giur. Comp. DIP.* 86. The contrary thesis by BAUMBACH, *Unlauterer Wettbewerb* (ed. 2) 82 that this meant a trespass on foreign jurisdiction was approved by RG. in 140 RGZ. 29 (next note), but the theory is repeated in the literature.

<sup>178</sup> RG. (Feb. 2, 1933) 140 RGZ. 25, 29, approving a thesis of NUSSBAUM, *D.IPR.* 340; the RG. was understood in this sense by OLG. Köln in 150 RGZ. 265. Also RG. (May 19, 1933) *Markenschutz und Wettbewerb* 1933, 446; (Jan. 10, 1936) JW. 1936, 129; and other decisions followed this approach. Cf. 7 *Giur. Comp. DIP.* Nos. 40, 41.

<sup>179</sup> See RG. (Feb. 14, 1936) 150 RGZ. 265 and Italian Cass. (April 2, 1927) *Foro Ital. Mass.* 1927 II 472; *infra* Chapter 26, p. 313.

<sup>180</sup> See KOSTERS 794 and n. 2.

<sup>181</sup> RUDOLF SCHMIDT, *Ort der unerlaubten Handlung* 183, 187 endorses all three contradictory theories of the Reichsgericht and surpasses them. A previous

*Illustration.* In the last-mentioned German case, P. and D., both firms in Aachen, manufactured pins and needles of a certain kind and exported them to the United States. The defendant firm founded an American subsidiary corporation and advertised its needles in this country as "entirely American," "a truly American product," "buy American pins," and so forth, and agitated for boycott against the plaintiff company. The court considered that, if the defendant in Aachen participated in the acts or used the American firm as an instrument in America, it would be subject to the German law, because German merchants have to adjust their competition to this law even abroad. But also, if the defendant merely tolerated or approved the conduct in question, it violated its duty in Germany itself. Perhaps the authority of this case may be restricted to the liability of a domestic firm for torts of its foreign subsidiary companies.<sup>182</sup>

These attempts to apply the law of the forum to foreign happenings, as usual, confuse equitable considerations with national peculiarities. What seems fair or unfair at a distant place, may not seem so at the forum. How can a German court judge foreign commerce by German standards? The court would have done better by insisting on ascertaining the American law on unfair competition, of which the published text of the decisions makes no mention. On the other hand, to burden the defendant with additional duties not owed by other merchants in the foreign market or to equip a national competitor with additional weapons, is contrary to the principles of economic equality.<sup>183</sup> The desirable pro-

writer (DANIELCIK, JW. 1936, 2614) proclaimed that acts done abroad are always subject to German law if they infringe "the fealty among the fellows of the race" ("volksgenössische Treupflicht"). Schmidt declares this is not enough; German law should be applied whenever a damage is felt in Germany. BEITZKE, Book Review on REU, Anwendung fremden Rechts in 66 Kritische Vierteljahrschrift (1938/39) 414, 417, has generalized the second of the theories above by suggesting that the nationality principle should replace the law of the place of wrong.

<sup>182</sup> Cf. RAAPE, D. IPR. 327 n. 1.

<sup>183</sup> DE SANCTIS, Rivista 1926, at 134.

motion of mercantile ethics should be pursued along the international road promisingly initiated by the Union of Paris.<sup>184</sup>

This question whether merchants domiciled within the forum are bound to the domestic rules in competing abroad, has not yet been raised in American cases.<sup>185</sup> It was under an essentially different aspect that certain famous decisions examined the application of the Anti-Trust laws to foreign business of American firms. In *American Banana Co. v. United Fruit Co.*,<sup>186</sup> Mr. Justice Holmes, speaking for the Supreme Court of the United States, dismissed an action by an American firm against an American competitor in the banana trade, because the Sherman Act on which the action was based, being primarily a penal statute, was not intended to contemplate acts done in Panama and Costa Rica; the Court, therefore, contented itself with the statement that under the law of the place of acting, the acts of the defendant were no torts at all.<sup>187</sup> In a later case,<sup>188</sup> the Supreme Court granted relief by enjoining violations of the Sherman and Wilson Acts, on the assumption that the defendants had established a complete monopoly over the purchase and commerce of sisal, a product of Yucatan, obtaining excessive profits. The steps necessary to bring about these results were deliberately taken by the defendants, and the action was held to be based on "a contract, combination and conspiracy entered

<sup>184</sup> Treaty for the Protection of Commercial Property, of Paris 1883, Bruxelles 1900, Washington 1911, and The Hague 1925 (revised London, 1934) in force in one of its phases almost throughout the world. Under article 10 *bis* the states are obligated to establish efficient protection against unfair competition.

<sup>185</sup> This statement is supported by the discussion in the recent work, CALLMANN, 2 *Unfair Competition and Trade Marks* (1945) 1756-8.

<sup>186</sup> (1909) 213 U. S. 347, 357.

<sup>187</sup> The criticism of this case by HUNTING, "Extraterritorial Effect of The Sherman Act," 6 Ill. L. Rev. (1912) 34 is inconclusive.

<sup>188</sup> *United States v. Sisal Sales Corp.* (1927) 274 U. S. 268, 276. For other cases, see CALLMANN, *supra* n. 185, 1754, 1755.

into by parties within the United States and made effective by acts done therein." Indeed, in the meantime between the two cases, the danger of international monopolies, frequently fostered by cartels,<sup>189</sup> had been realized, and the potential weapons offered by the anti-trust laws were used more consciously. Such repression of monopolistic conspiracies is intended to protect the domestic commerce rather than the individual interests involved. The forum applies its public law with its reflections in private spheres. This development is fundamentally distinguishable from the idea of subjecting competing domestic firms to a domestic standard of behavior in foreign markets.

<sup>189</sup> See MOLLOY, "Application of the Anti-Trust Laws to Extra-territorial Conspiracies," 49 Yale L. J. (1940) 1312.



## The Place of Wrong<sup>1</sup>

### I. SURVEY OF SOLUTIONS

THE rule that problems of the law of torts are to be decided in accordance with the law of the place of wrong presupposes a determination of the place where the wrong has been committed. The following illustrations show some of the many situations in which this problem presents difficulties.

Illustrations: (i) A letter containing defamatory statements about B, a person residing in Y, is mailed by A in state X and received by C in state Z.

(ii) A in state X sends poison concealed in candy to B in state Y. B takes the candy to state Z where he eats some of it, falls ill in state M, and dies in state N.

(iii) A, standing in state X, fires a gun and lodges a bullet in the body of B, who is standing in state Y.

#### 1. Theory of the Place of Injury (The American Rule)

Under the traditional American rule, the wrong is considered as being done where the injury takes place.

The Restatement has expressed this rule in the following terms:

"Section 377. The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

Applying this rule to the illustrations stated above, we

<sup>1</sup> RHEINSTEIN, "The Place of Wrong, A Study in the Method of Case Law," 19 Tul. L. Rev. (1944) 4, 165; RUDOLF SCHMIDT, *Der Ort der unerlaubten Handlung im internationalen Privatrecht in Festgabe für Heinrich Lehmann* (1937) 175.

are informed<sup>2</sup> that the place of wrong is where the defamatory letter arrives, where the poisoned person falls ill, and where the bullet meets the body. (That these answers are not quite obvious is a separate point.)

Although this rule has met with some substantial criticism<sup>3</sup> and is contrary to the prevailing opinion of European writers, it thus far has commonly been taken as firmly established and supported by an "almost unbroken line of authority."<sup>4</sup> While this is written, however, Max Rheinstein in a highly suggestive study has undertaken to destroy the doctrine of the Restatement and of the encyclopedias. His detailed historical analysis of the cases results in the finding that the rule has not been applied as *ratio decidendi* in all jurisdictions as often as lip service has been paid to it, and that the formation of the rule was unduly influenced by precedents regarding the demarcation of ordinary jurisdiction from admiralty cases, criminal cases, and cases dealing with local actions.<sup>5</sup>

After this penetrating analysis, the traditional rule, applied in a mechanical way for such a long time, will have to stand the test of an examination according to standards of convenience. In the present writer's opinion, much is to be said in its favor, but a few modifications seem to be suggested by comparative considerations.

What idea actually supports the rule in the American doctrine? Historically it may have originated in the field of interstate transportation and communication, as a simple device to identify the applicable law at the place where the physical impact occurs.<sup>6</sup> This idea seems to conform well to the old construction that a carrier's duty of care is not com-

<sup>2</sup> Restatement, Note to § 377.

<sup>3</sup> STUMBERG 166.

<sup>4</sup> Note, 133 A. L. R. 260.

<sup>5</sup> RHEINSTEIN (*supra* n. 1); see in particular at 171 on the political case of 1811, *Livingston v. Jefferson*.

<sup>6</sup> This is a kind suggestion by Yntema.

prised in the contract of transportation without express stipulation.<sup>7</sup> The view is exclusively focused on the time and place of the actual harm. The theory of vested rights found here an apparently suitable example. For advocates of this theory, such as its last (we hope) defender, Beale, it was natural that the injured person should acquire an indefeasible right at the moment in which all elements of a tort action are existent and hence the cause of action is born. While today the vested rights doctrine may be regarded as moribund, the conception still lingers in the mind of the courts that a tort must be localized at the place where its last element is added to the others, because then only a cause of action arises. An unlawful and faulty act is not a tort until it creates an injury.

"It cannot be denied that negligence of duty unproductive of damnifying results will not authorize or support a recovery."<sup>8</sup>

"Until all the elements are present a cause of action cannot arise, and the tort is considered as transpiring as a whole in that place where the combination becomes complete."<sup>9</sup>

By an interesting though erroneous variant it has been asserted that "the locality of the act is deemed at common law to be the same as that of the damage."<sup>10</sup>

## 2. Theory of the Place of Acting (The Civil Law Rule)

The great majority of the European writers,<sup>11</sup> followed

<sup>7</sup> See *supra* Chapter 24 p. 288.

<sup>8</sup> Alabama, etc. R. Co. v. Carroll (1892) 97 Ala. 126, 11 So. 803.

<sup>9</sup> SCHERMERHORN, Tennessee Annotations to the Restatement § 377.

<sup>10</sup> Connecticut Valley Lumber Co. v. Maine Central R. Co. (1918) 78 N. H. 553, 103 Atl. 263.

<sup>11</sup> Institut de Droit International (Munich, 1883) 7 Annuaire (1885) 129, 156; 2 BAR 120; GIERKE, 1 Deutsches Privatrecht 234; 1 ZITELMANN 112; 2 *id.* 480 (on ground of alleged public international law, but also the most elaborate writing on the practical effects of the theories in question); WALKER 526; NEUMEYER, 2 Int. Verwaltungs R. 48; cf. RAAPE 203 and D. IPR 325; 2 ARMINJON (ed. 2) 342 n. 2; BARTIN, 2 Principes 416 (place of the "fait illicite générateur du préjudice"; CUNHA GONÇALVES, 1 Direito Civil 673.

by some courts,<sup>12</sup> define the place of wrong as that where the allegedly tortious conduct was carried out by the defendant. In the case of a commissive tort, this is the place where the actor has engaged in the bodily movements resulting in the damage. Under this approach, in our examples, defamation is committed where the letter is mailed, poisoning where the candy is sent, and personal injury where the shooting person stands.

This literature objects to the law of the "place of effect" that it is often difficult to ascertain, that effects may occur in a plurality of states, and that they may obtain at a place by accidental causation, to the surprise of the actor and possibly also of the victim. It is considered unfair that conduct should be subjected to a law the intervention of which could not be foreseen. Stated positively, the argument is that the actor is entitled to count on the laws of the state where he acts. While he has to obey these laws, he should be protected by them. The educational reasons of the laws that regulate human behavior and distribute the pecuniary effect of a damaging conduct are concerned with the acts or omissions rather than the effects in individual cases.

### 3. Elective Concurrence of Claims (The Reichsgericht Rule)

The German Reichsgericht has combined the first two theories. This court holds that a tort is committed in both the place where the actor engages in his conduct and the place where the effects of his conduct occur. The injured person may choose to sue under one law or the other; in each case, the chosen law is applied in its entirety on the whole facts so as to determine all requirements of the cause of action and

<sup>12</sup> France: Trib. civ. Seine (May 27, 1896) *aff'd*, Cour Paris (June 23, 1899) Clunet 1901, 128.

Germany: RG. (April 24, 1889) 44 Seuff. Arch. 257 No. 161.

Italy: App. Milano (Sept. 19, 1881) Clunet 1883, 73 (insertion of a libelous article into a newspaper).

its effects. Hence, the victim is favored by being allowed to elect the law most advantageous to his demand, but he is not permitted to cumulate the benefits flowing from more than one law.<sup>13</sup>

The formula employed in constant practice was first established in a plenary decision of the Reichsgericht in 1909, concerning the jurisdiction of the court at the *locus delicti commissi*, but was soon extended to choice of law: "a place of tort is assumed to be wherever an essential part of the tort has been committed."<sup>14</sup>

Applying this approach to the illustrative cases described above, the defamation (i) may be localized where the letter has been sent or where it was read;<sup>15</sup> the poisoning (ii) where the candy was sent, where it was received, and where it was eaten;<sup>16</sup> and the shooting at both the places of acting and wounding. In addition, also the places where the victim died, and where dependent persons lost maintenance, are eligible for the purpose of choice of law.

This view has been followed by the Swiss Federal Tribunal,<sup>17</sup> and in a case of unfair competition (a field in which also the most characteristic German actions developed) by the Italian Supreme Court.<sup>18</sup>

The arguments advanced by the Reichsgericht were precarious and easily criticized by the advocates of the place of acting. Theoretical support has finally come forth. Neuner<sup>19</sup>

<sup>13</sup> RG. (Nov. 20, 1888) 23 RGZ. 305; and constant practice. See MELCHIOR 168 n. 3.

<sup>14</sup> RG. (Oct. 18, 1909) 72 RGZ. 41; RG. (Nov. 8, 1906) 62 Seuff. Arch. No. 150; RG. (Jan. 30, 1936) JW. 1936, 1291, 1292; RG. (Feb. 14, 1936) 150 RGZ. 265.

<sup>15</sup> Cf. 23 RGZ. 306.

<sup>16</sup> Cf. RG., JW. 1900, 477.

<sup>17</sup> BG. (Nov. 6, 1896) 22 BGE. 1164; (March 6, 1914) 40 BGE. I 8, 20 (sending and arrival of a deceiving letter, in a criminal case but with general argument).

<sup>18</sup> Italy: Cass. (April 2, 1927) Foro Ital. Rep. 1927 I 472 No. 51.

<sup>19</sup> NEUNER, Der Sinn 116; see also SCHELLING, 3 Z.ausl.PR. (1929) 866; RAAPE 202ff.

remarks that a person doing a part of the tortious acts in the state, or acting from abroad but effecting an injury in the state, sufficiently deserves to be subjected to the responsibility established therein. A sound international distribution of the administration of justice allows that several states may concur in suppression of tort. If a state regards conduct as nontortious, it ought, nevertheless, to tolerate a different view in another jurisdiction where a part of the facts occur.

The same doctrine has been applied in Germany and other countries to criminal<sup>20</sup> and civil jurisdiction<sup>21</sup> based on the *locus delicti commissi* principle.

#### 4. Mixed Solutions

(a) *Influence of the law of the place of acting.* The Restatement contains a section seemingly inserted against Beale's theoretical view,<sup>22</sup> which expressly refers to the place of acting. Where a person is required by law or authorized by a privilege, to act or not to act in a state, he will not be held liable for the events resulting from his act in another state. The comment borrows an illustration from the old English case *Regina v. Lesley*<sup>22a</sup> where a shipmaster was forced by Chilean authorities to take a prisoner on board. The Restatement suggests that the legality of the detention by the shipmaster be determined according to the Chilean law, although the man, by the effect of concurring circumstances, had to stay on the ship during the entire voyage; all other requirements would be governed by the law of the flag (replacing the law of the place of wrong).

The other illustrations speak of a health officer burning

<sup>20</sup> 1 BEALE 317 ns. 3 and 4; RHEINSTEIN, *supra* n. 1, 19 Tul. L. Rev. (1944) 196 (as to England and most American states); Italian Penal Code of 1930, art. 6; LILIENTHAL, Der Ort der begangenen Handlung, in Festgabe für Georg Wilhelm Wetzell, Marburg 1890; see also 72 RGZ. 43 footnote.

<sup>21</sup> Germany: ZPO. § 32; RG. (Jan. 10, 1936) JW. 1936, 1291, 1292.

<sup>22</sup> § 382. See RHEINSTEIN, 19 Tul. L. Rev. (1944) at 10.

<sup>22a</sup> (1860) Bell C. C. 220.

infected rags and a sheriff shooting a fleeing murderer, so near the border that injuries result on the other side of the frontier.

This rule has been regarded as an inadequate attempt to narrow down the place of injury rule.<sup>23</sup> It may, however, be questioned also from the contrary view, as going too far. Commonly, the mistake is committed to treat on the same footing cases where a tort is entirely done in one territory, although effects occur elsewhere, and where the acting extends to more than one territory. Certainly, there is justification for recognizing that the arrest of a man, quite as much as the seizure of an object,<sup>24</sup> is no tort if it is lawful under the law of the place where the whole act has been done *and completed*. Any effects happening in another jurisdiction ought not to alter this postulate which, perhaps, may be generalized into an important rule involving all acts completely done in one jurisdiction and alleged to violate the "law": the "law" in question ought only to be that of the place where the act is entirely performed. While *this* is a necessary modification to any theory of the place of injury, it is not exactly the place of corporal movement *per se* that accounts for it; if the Restatement (illustrations 4 and 5) declares that someone shooting in state X and hitting a person standing in state Y enjoys privileges conferred by law X, this is a very doubtful proposition. We shall have to discuss below acts extending over several jurisdictions. Nor does the evident equity of the postulate hold good for the entire field of privileges and duties to act. Suppose, for instance, that the Chilean law in reality did not empower the governor of the province to give the order to the British shipmaster. Whether the latter's erroneous belief that he had to obey excused him

<sup>23</sup> RHEINSTEIN, 19 Tul. L. Rev. (1944) at 13.

<sup>24</sup> See, for instance, the Netherlands: App. Leeuwarden (Feb. 6, 1929) W. 12014, VAN HASSELT 309.

when he helped to deprive the plaintiff of his freedom need not necessarily be, and probably should not be, determined by the local (Chilean) law, by exception to the regularly applicable law of the flag.

The inspiration received from *Regina v. Lesley* suggests some connection with the English rule that the act must be unjustifiable under the *lex loci actus*, although also actionable at the English forum. However, all supporting English cases deal with acts entirely done in a foreign country.

Indeed, in the *Lesley* case it was stated as a separate offense that the continuing detention of the prisoner after the vessel left the Chilean territorial waters, constituted false imprisonment by application of the British law of the flag. Thus, there was no aftereffect of the Chilean privilege on the high seas to be condoned because of the Chilean law. Neither do these decisions fortify the theory of the Restatement, nor is their own theory explained by the provision of the Restatement.

(b) *Influence of the law of the place of effect.* On the other hand, a few writers who believe in the decisiveness of the place of acting have made an exception in favor of the place where the effects of a tort appear, when the acting person either intends the effects in another state or recklessly does not care where his acts take effect.<sup>25</sup>

On another ground, Rheinstein has recently suggested that while on principle the law of the place of acting should govern, another state where the effects take place may, in virtue of its public policy, adjudicate a claim according to its own law of tort, provided that the actor could foresee that it would cause harm in that other state. Third states would not be, therefore, in a position to apply this latter law.<sup>26</sup>

(c) *Differentiated solutions.* A remarkable suggestion was

<sup>25</sup> HABICHT 95; RAAPE 206 (with restriction to cases involving the state frontier).

<sup>26</sup> RHEINSTEIN, 19 Tul. L. Rev. (1944) at 31.



made by Meili<sup>27</sup> in 1902 and regrettably fell into oblivion. He knew the difficulty of finding a good formula for all cases and advocated different rules for fixing the place of wrong in the cases of seizures, press delicts, and defamations.

### 5. Differences of Policies

Another important contribution to our topic has been made by pointing out that the law of torts has a threefold social function and that the local contact of a tort depends upon the function most emphasized. The three functions are said to be the following:

"A primary purpose is to fix the standards of conduct of a person so he can know what he may do and what he may not do, and so that others can know what type of conduct to expect from him. This purpose of delimiting tort liability suggests that it is for the state where a person acts to determine whether his conduct and its consequences create liability.

"Another purpose . . . is to fix the measure of protection to which each person is entitled against his fellows. This purpose suggests it is for the state where the damage is suffered to determine whether the damage was wrongfully inflicted and gave rise to a right of action in tort. The recent extension of liability without fault with consequent emphasis on the protection of the injured party rather than on the wrongfulness of any conduct involved may indicate this purpose is the fundamental one in a wide part of the tort field."<sup>28</sup>

Third, the purpose to give compensation is thought to

<sup>27</sup> MEILI 96. Already 2 BAR 120 n. 9 recommended a special rule for the press, pointing to the publication rather than the sending of articles. I would like to refer also to the (unfortunately unelaborated) observation of FEDOZZI 760: If it is true that one who acts at a certain place must respect the provisions of the local law and incurs a liability by committing an illicit act according to this local law, it is no less true that, for determining the damages due to the victim of the illicit act, the place where the harm has happened must be taken into consideration. On the other hand, 2 ZITELMANN 478-480 has rejected Bar's suggestion as unfounded, and this seems to be the general opinion.

<sup>28</sup> CHEATHAM, Cases 416; the authors mention as a fourth purpose "civil penology" which may play an additional role.

lead possibly to the state of the "injured person's domicil."

Except for this third approach, which no law has followed and which does not appear to be commendable, these remarks are thought-provoking.

Obviously, however, the bulk of the tort laws cannot be neatly divided into two groups, one of which, by virtue of a policy protecting private interests, would be appropriately allocated to the American rule, while the other, devoted to the prevention of undesirable conduct, would belong to the place of acting theory. Most tort laws are supported by both policies in an unascertainable mixture. Besides, if the same type of tort were to be characterized separately in each state according to a particular shade of policy, new difficulties would top the old ones.

Nevertheless, it is quite true, there are types of tort such as liabilities without fault which ought to be localized in a specific manner. It will appear, however, that their particular localization is not directly due to the policy and still less to the interest of the state, but to the technical shape of the obligation, although this, of course, is conditioned by both policy and interest considerations. For example, a railroad enterprise must commonly bear the damage done to passengers in an accident on its rails without the plaintiff's proof that the management or the agents were at fault. The policy supporting such statutes is as much intended to lay a great part of the risk on the economically stronger party, as to adjust the unequal procedural situation in litigating against a complicated big industrial enterprise or to discourage railroads from negligent methods of operation. It is impossible to infer from one part of this policy a device for localization and not from the others. Yet, the purpose of the tort rule in which the legislative considerations converge is sharply expressed in the technical shape of an absolute or strict liability directly established on the fact of the accident. This, indeed, ought

to be a strong reason for localizing this kind of tort. It is directly centered at one place through the very purpose of the legislator, brought to evidence by the structure of the specific tort.

It will be opportune, first to analyze the significance of the various local contacts that may be produced by the several elements of a tortious liability.

## II. THE PLACE OF ACTING

### I. Preparatory Acts

As in penal law,<sup>29</sup> preparatory acts are distinguishable from the elements of the cause of action. Writing a defamatory letter, loading a rifle, designing an imitated trade-mark, are outside of the essential elements of defamation, killing, or unfair competition, although they may constitute by themselves independent offenses in other categories under distinct regulatory provisions, e.g., possession of dangerous weapons, counterfeiting, industrial espionage, or make an accessory liable in addition to the principal tortfeasor. Acts preparatory to a tort do not characterize it and, hence, are unable to localize a tort. Where, for instance, damages are sought for an unfounded arrest, the place at which the defendant affixed his signature to the power of attorney authorizing his lawyer to file the petition for the arrest, is immaterial.<sup>30</sup>

This simple truth refutes many Continental authors and a few European decisions advocating the place where a letter containing a libel or unfair competition has been written and mailed. It is a different case where a defamatory letter has been "published" according to Anglo-American conceptions, by dictating it to a stenographer or delivering it to a translator before posting.

<sup>29</sup> Germany: EBERMAYER-LOBE-ROSENBERG, *Strafgesetzbuch* (ed. 3, 1925) § 3 n. 12.

<sup>30</sup> MEILI 96.

## 2. Acts and Omissions

(a) *Omissive torts*. Acting in the field of torts is ordinarily conceived as a physical movement, one of the muscles or the nerves. Thus, the health officer burning infected rags, in the previously mentioned example of the Restatement, "acts" at the place of the burning. Correspondingly, omission, as an element of a tort species, is the failure to act by bodily movement. On the basis of their theory referring to the law of the place of acting, the European writers have been embarrassed by the question, how to localize an omission. They agree that an omission is committed where a duty to act exists but disagree on the state entitled to impose this duty. Is it the state where the alleged tortfeasor is present at the time and, therefore, would be able to act bodily?<sup>31</sup> Or where he is domiciled?<sup>32</sup> Or, after all, that of the injury?<sup>33</sup> Or, does the criterion vary according to the circumstances?

To support the third solution, the following example has been discussed.<sup>34</sup> A resident of London, the owner of a house situated in Vienna, is certainly liable for an injury to a passer-by caused by a collapse of the building, according to the Austrian statutory provision (deriving, like many others, from the Roman *cautio damni infecti*).<sup>35</sup> The problem cannot be determined by English law, which, by the way, produced an analogous remedy only after this discussion in 1934.<sup>36</sup> This type of liability is unmistakably tied to the local situation of the building, irrespective of the place where the owner

<sup>31</sup> 2 ZITELMANN 490.

<sup>32</sup> 2 FRANKENSTEIN 370.

<sup>33</sup> WALKER 527.

<sup>34</sup> WALKER 527; 2 FRANKENSTEIN 370; RAAPE 208.

<sup>35</sup> Dig. Title 39, 2; Austrian Allg. BGB. § 1319 (as of 1916); French C. C. art. 1386; German BGB. § 836.

<sup>36</sup> Wilchick v. Marks and Silverstone [1934] 2 K. B. 56, cf. 10 Z.ausl.PR. (1936) 280; WINFIELD, Text-Book of the Law of Tort (ed. 2, 1943) 506.

might have written an order for inspection or repair. The problem, in fact, materialized in the Belgian courts.<sup>37</sup> A Belgian company owned a building in Germany which it failed to repair. A Belgian citizen was killed by its collapse. The court applied the national law common to both parties, in this case an evident mistake.

Similarly, the failure of a locomotive engineer to give a warning signal at a distance of three hundred yards before passing a street crossing, cannot be judged under any other standards than those offered at the place of the crossing. A state boundary running two hundred yards from the crossing cannot alter the duty.

On the other hand, if a man advises a friend to go with his family to a resort where infection by scarlet fever may easily occur, his duty of warning him, if any, cannot be imposed by the state of the resort but that where the advice is given. The negligent counsel, not the injury, in this case is the only possible basis of liability.

(b) *Accomplices*. A seizure of goods was sought and accomplished in British India on a pretended claim that later proved unfounded. Damages were asked in a suit against a firm in Bremen, Germany, and awarded under the German law, the construction being that this firm had caused the seizure by incitement.<sup>38</sup> The German Reichsgericht likewise declared a German company liable, under German law, for unfair competition committed by its American subsidiary, where the German company "caused or decisively influenced" the conduct of its affiliate.<sup>39</sup> If, however, the tort committed by the chief actor was localized in India or the United States,

<sup>37</sup> App. Bruxelles (Jan. 3, 1908) Clunet 1909, 241; Cass. Belge (Nov. 26, 1908) Clunet 1909, 1178.

<sup>38</sup> OLG. Hamburg (Jan. 18, 1928) Hans. RGZ. 1928 A 431, IPRspr. 1928 No. 38.

<sup>39</sup> RG. (Feb. 14, 1936) 150 RGZ. 265. The decision enumerates other facts leading to a similar liability, which have been considered *supra* p. 298.

it seems evident that the liability of an accessory to the act should be determined according to the same law.

### 3. Acting in Several States

Two groups of situations ought to be distinguished.<sup>40</sup>

(a) *Separate torts in several countries.* The conduct of the actor may be carried on in more states than one as in the following illustrations:

(i) Defendant has inserted a libelous statement about the plaintiff in twenty newspapers, each of which is published in a different state;

(ii) Defendant, by carrying on propaganda in several states, has induced a group of employers throughout these states to lock out their employees;

(iii) Defendant has committed continued assault upon the plaintiff while he and the plaintiff were crossing a state line on a train.

A common characteristic of these cases is the plurality of acts each of which creates a tort. By mere logic, every partial activity is subject to its own localization. The results, however, under any ordinary method of localization, are inconvenient. Thus, under the place of injury theory, where a libelous article was inserted in a newspaper published in Hamburg, then a territory of Roman law, and circulated in various other places, the Hanseatic Appeal Court applied to each defamation its own local law,<sup>41</sup> the damages being assessed separately for each territory. The decision would be the same under the prevailing approach in this country. Objections to such unsound complications are obvious.<sup>42</sup>

<sup>40</sup> 2 ZITELMANN 486.

<sup>41</sup> OLG. Hamburg (June 11, 1897) Hans. GZ. 1898, Beibl. No. 146, cf. LEWALD 263.

<sup>42</sup> They are the same as in the case of a broadcast heard in several states, on which see *infra* 4 sub (d), pp. 320 ff.

Again, if the place of acting in its usual meaning should be followed, each tort is characterized by the place where a libelous statement has been dispatched to be published in a newspaper or broadcast and, similarly in example (ii), by that where the defendant has mailed his letters. This may practically simplify localization, but mailing is in fact only a preparatory act and, therefore, not characteristic at all of the tort.

A more adequate approach ought to be found, abandoning both contending theories.

(b) *Single tort committed by partial acts in several states.* In the same way as a criminal offense, an intentional tort may be committed by several acts connected by one volition. For example:

(iv) Firm A, for the purpose of competition with B, uses an imitated trademark in state X, publishes untrue statements concerning this trademark in Y, and sues B in a vexatious suit for annulment of the latter's trademark in state Z. While each of these acts may or may not present an independent cause of action, they are normally made the subject of one lawsuit for damages on the ground of unfair competition.

(v) A railway brakeman negligently couples two cars in state X, and the train runs with the uncontrolled defect through states Y and Z, finally derailing. Or, a truck affected by engine trouble, due to the negligence of a garage employee of the owner firm, injures a person after passing a state border. No cause of action can be found unless all the elements of partial acting occurring in several states are added together. Where is the tort "committed" for the purpose of conflict law?

The only existing answer to this question by a legal text, article twenty-eight of the International Convention on the Transport of Passengers, in the case of death, injury, or delaying of passengers, refers oracularly to "the law of the state

where the fact has occurred"<sup>43</sup>—which fact, we do not learn.

From the basis of their place of acting theory, German writers have discussed whether the place of acting should be defined as where the "most efficient part" of the conduct has been carried on;<sup>44</sup> or whether conduct carried on in several states should never involve the actor in liability, unless it is actionable in every one of such states.<sup>45</sup> While in the United States the place of wrong is usually defined as the place where the last part of the defendant's conduct is carried on, in Europe the place of its first part also has been considered.

In this country, in fact, all places of acting are generally disregarded.<sup>46</sup> In a rare attempt of justification,<sup>47</sup> the Mississippi Court, deciding the case in illustration (v), explained that the railway company is present everywhere in its network of lines, and any negligence committed is felt at the place where the injury occurs. "The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used."<sup>48</sup> If this means that the places of negligent acts or failures to act may be unknown without altering the liability under the law of the place of injury, it is convincing. If, however, a definite cause has been proved, as supposed in the example, it is difficult to see why the railway could not be sued also under the law of the state where the fateful negligence was committed.

<sup>43</sup> Convention of Berne, of October 23, 1924, art. 28 § 1; revised at Rome, on Nov. 23, 1933, see HUDSON, 6 Int. Legislation 568 at 579.

<sup>44</sup> NEUMEYER, IPR. 32; HABICHT 95.

<sup>45</sup> Discussed and rejected by KAHN, 30 Jherings Jahrb. 119, 1 Abhandl. 120.

<sup>46</sup> Nashville, etc. R. Co. v. Foster (1882) 78 Tenn. 351; Chicago etc. R. Co. v. Doyle (1883) 60 Miss. 977; Cincinnati, etc. R. Co. v. McMullen (1889) 117 Ind. 439, 20 N. E. 287; Alabama, etc. R. Co. v. Carroll (1892) 97 Ala. 126, 11 So. 803; El Paso, etc. R. Co. v. McComas (Tex. Civ. App. 1903) 72 S. W. 629.

<sup>47</sup> The Carroll case repeats the usual argument of injuries commenced in one state and completed in another.

<sup>48</sup> Chicago, etc. R. Co. v. Doyle, *supra* n. 46.



It is noteworthy that the same decision added with respect to negligence by active conduct: "Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state." Apparently, this court would not entirely disapprove of the German practice granting a choice between the laws of all jurisdictions where faulty conduct has occurred or harm is caused.

Among the suggestions contributed by the literature, the proposition deserves attention that the most characteristic part of the tortious activity should prevail in localizing the tort. More appropriately, not just some part of the corporal movements of the tortfeasor but the most characteristic element of the entire cause of action should indicate which is the decisive place and the law best qualified to govern.

#### 4. Acting at a distance<sup>49</sup>

(a) *Means of acting in foreign jurisdictions.* A person is generally said to act where his bodily movements occur. But how does such an approach conform to the epoch of telephone and radio? Half a century ago, the German Civil Code had already assimilated an offer made by telephone to an oral offer.<sup>50</sup> The voice may be audible only to the person addressed. Messengers were used in most remote antiquity, and the Roman common law, thoroughly adverse to contracts made by agents, i.e., acting by another free person, opposed no obstacle to declarations sent by a "*nuntius*" or, in other words, transmitted through a person as an instrument. A third equivalent situation derives from the concepts of criminal law: a responsible person—"indirect actor"—commits a wrong by compelling another person or inciting a child or lunatic, to do the material act.

<sup>49</sup> Considerations of this sort, to my knowledge, have been only expressed by RAAPE 204 and D. IPR. 326; KOSTERS 794, on the spur of a decision of the Dutch Hoge Raad, mentions acting by an instrument at a distant place.

<sup>50</sup> BGB. § 147 par. 1.

In addition to the obvious, though in conflicts matters strangely neglected, application of these devices to tortious conduct, it has become fully recognized that a legal person may commit a tort by the act of its representative.<sup>51</sup> Although vicarious liability has been incorrectly construed on the basis of agency,<sup>52</sup> it also shows a case of liability for unlawful acts done by other persons.

Hence, the theory advocating the law of the place of acting is entirely antiquated, if it stresses physical movements. Not the locality where a person operates, but that to which his operations are directed, is material. A person who slanders another over the telephone does not commit defamation in the telephone booth, but rather where the words are heard.

(b) *Letters*. Although some older European decisions have favored the place where a letter is written and mailed,<sup>53</sup> the constant practice of the Reichsgericht,<sup>54</sup> followed by courts of other nations,<sup>55</sup> regards both the places where the letter is sent and where it is received, as places of wrong. The latter is often identical with that where the suit is brought and the law of which is applied. In this country, the cases reach the same result upon the theory that the injury, prevailingly a defamation, is inflicted at the place of arrival and reception.<sup>56</sup> But that a sender acts through the mail as instrument

<sup>51</sup> *Supra* p. 128, cf. p. 74 n. 28.

<sup>52</sup> *Supra* p. 272.

<sup>53</sup> Bavaria: Oberappellationsgericht (March 16, 1847) 12 Blätter für Rechtsanwendung in Bayern 287: an injurious letter was sent from a place under German common law to a place of the Prussian Code; the injury is *completed* at the place where the letter was written and mailed, since the sender was firmly convinced that the letter would reach the addressee.

Switzerland: Cass. Zürich (March 16, 1912) 12 Bl.f.Zürch. Rspr. No. 71, 25 Z.int.R. 296.

<sup>54</sup> RG. (Nov. 20, 1888) 23 RGZ. 305 (information about credit); (Dec. 21, 1900) 56 Seuff. Arch. 308 No. 175 (unfair competition); (Dec. 22, 1902) 13 Z.int.R. 171; (Dec. 2, 1921) 22 Markenschutz und Wettbewerb 61 (unfair competition).

<sup>55</sup> Switzerland: BG. (March 6, 1914) 40 BGE. I 8 (criminal deceit by letter).

<sup>56</sup> Restatement § 377 note 5; *Haskell v. Bailey* (1894) 25 U. S. App. 99, 63 Fed. 873; cf. HANCOCK, Torts 252 n. 3.

until the letter is delivered, is a construction familiar to the courts. Consequently, with a slight difference, we may emphasize the delivery rather than the reading of the letter and obtain a rule based on a time and place more easily evidenced. This is exactly what acting at a distance involves.<sup>57</sup>

(c) *Suppliers*. Another important example is furnished by the liability of suppliers to third persons without contractual connection, so remarkably developed in this country from Cardozo's famous decision in *McPherson v. Buick*.<sup>58</sup> In *Hunter v. Derby Foods*,<sup>59</sup> fatally spoiled canned goods were shipped to Ohio. The court applied the advanced law of Ohio, the decisive place being where the victim ate and died and not where the distributor shipped the food; the court compared the case to shooting a firearm across the state line or owning a vicious animal which strays over the state line. However, in this case, the place was identical with that to which the seller had shipped the food. Another case is particularly informative. To use the résumé by Hancock: "In *Reed and Barton v. Maas*, a coffee urn, which had been defectively constructed in Massachusetts by the defendant was sold by him to a caterer in Wisconsin. The urn, while in use by the caterer, spilled hot coffee upon the plaintiff in Wisconsin. Wisconsin law was allowed to define the legal position of the manufacturer-defendant."<sup>60</sup>

Suppose the caterer had taken the urn to Alaska or Iran or simply sold it to a colleague overseas. Would a customer injured there have an action, too, according to the local laws

Similarly, Scotland: *Evans & Sons v. Stein & Co.* (1904) Court of Sessions, 42 Scot. L. R. 103, Jurid. Rev. 1905, 402.

<sup>57</sup> Also CUNHA GONÇALVES, 1 *Direito Civil* 673, an advocate of the law of the place of acting, teaches that defamation by a mailed letter is committed at the place where it is handed to the addressee.

<sup>58</sup> *McPherson v. Buick Motor Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; PROSSER, Torts 673 § 83.

<sup>59</sup> (C. C. A. 2d 1940) 110 F. (2d) 970; Note, 133 A. L. R. 260.

<sup>60</sup> (C. C. A. 1st 1934) 73 F. (2d) 359; HANCOCK, Torts 254.

of these parts? The prevailing American form of the supplier's liability requires an injury to such persons as the supplier would expect to be in the vicinity of its probable use<sup>61</sup> and, thus, may prevent surprising references in conflicts law. In fact, the place to which the manufacturer or merchant ships the defective goods, marks the point where his responsible acting ends for the purpose of choice of law.

Recently the English Court of Appeals considered the sale by a New York corporation to an English distributor, of a product for destroying vermin, the property passing in New York. The American seller supposedly should have given warning that purchasers should be given proper written instructions respecting safe use of the product. When after a subsale in England, a farmer suffered damage from the product and obtained compensation from the buyer, an action for recourse based on tortious negligence was set aside because nothing had been done by the corporation in England.<sup>62</sup> This would have been a correct decision only if the warning was due to a person in New York itself.

(d) *Broadcasts, newspapers, and the like.* Mass communication by broadcast and newspapers present analogous problems. The Restatement declares that harm to the reputation of a person is done at the place where the defamatory statement is communicated and, in case of a broadcast, where the broadcast is heard by people conversant with the plaintiff's good repute.<sup>63</sup> Evidently, if the broadcast is heard in many states, the places of wrong may be multiplied. This seems the more so, as "publication," a requirement of libel or slander, is generally held to exist wherever the defamatory statement is heard and understood by any third person.<sup>64</sup>

<sup>61</sup> 2 Restatement of the Law of Torts § 395.

<sup>62</sup> *George Monro, Ltd. v. American Cyanamid and Chemical Corp.* [1944] K. B. 432.

<sup>63</sup> Restatement § 377 note 5.

<sup>64</sup> 3 Restatement of the Law of Torts § 577; HARPER, Torts § 236.

A libelous newspaper article causes injury at the place of the original publication as well as at all places of circulation.<sup>65</sup> European courts have decided on the same lines.<sup>66</sup> The Reichsgericht has argued that communication of a newspaper is analogous to that by a letter; the paper is sent to other places as a letter is sent.<sup>67</sup> But an English court, even with respect to assuming jurisdiction "at the place where a tort has been committed," has conveniently added that an inconsiderable circulation of a foreign newspaper in England may be negligible.<sup>68</sup>

With this feeble correction, all theories converge in the assumption of a multitude of places of wrong and in senselessly complicated procedural burdens on court and parties. In a few recent American cases, however, the disadvantage of such "checker-board jurisprudence," as Federal District Judge Wyzanski of Massachusetts called it, has been keenly felt. Asked for a decree to enjoin unfair competition by the use of trade-marks, he excluded "writing opinions and entering decrees adapted with academic nicety to the vagaries of forty-eight states."<sup>69</sup> Likewise, Judge Learned Hand, in the Federal Second Circuit Court of Appeals, refused an injunction to safeguard the exclusive right of an orchestra conductor to broadcast disks of his phonographic records publicly sold, a right recognized only in Pennsylvania, while unauthorized reproductions would be lawful in the other states. Any injunction on broadcasting under such circumstances, was considered as going entirely too far, since it could not be confined to hearers in Pennsylvania.<sup>70</sup>

<sup>65</sup> 3 Restatement of the Law of Torts § 581.

<sup>66</sup> Germany: RG. (May 15, 1891) 27 RGZ. 418; RAAPE 205.

<sup>67</sup> RG., *supra* n. 66, at 420, 421.

<sup>68</sup> *Kroch v. Le Petit Parisien* [1937] 1 All E. R. 725, C. A. The court, of course, concedes that technically circulation in England has occurred, but uses its discretionary power to refuse an order for service out of the jurisdiction.

<sup>69</sup> *National Fruit Product Co. v. Dwinell-Wright Co.* (1942) 47 F. Supp. 499, 504.

<sup>70</sup> *RCA Manufacturing Co. v. Whiteman* (1940) 114 F. (2d) 86.

What law, then, should be applied? Should it be the *lex fori*, as was the principle adopted in the first-mentioned case?<sup>71</sup> The facts of this case seem to warrant another theory to the same effect of applying the local law; the competition was evidently centered in the state. When an action was brought, in the same federal district court sitting in Massachusetts, to enjoin unfair competition committed by unlawfully reproducing horse-race charts in a newspaper, the conflicts rule of the state court was supposed to be in favor of the local law, for the reason that the defendants prepared all their material, and the greater part of the competition occurred, in Massachusetts.<sup>72</sup> In an older leading case discussed above on unfair competition committed by the use of a brand which was protected as a trade-mark in the United States but not in Germany, the American court took jurisdiction and applied federal law, because the fraudulent conspiracy to affix the brand in Germany on barrels to be sent there, was conceived in the United States and the barrels were manufactured and filled here and shipped from American ports;<sup>73</sup> in fact, the most important part of the activities was carried out within the jurisdiction. Of particular interest is another case where the circuit court of appeals in Chicago purposefully stressed the main charge to be the misappropriation of a business system, the essential of this wrong being the manufacture and sale of certain plates in Illinois. The circumstance that no tort was committed until the plates were actually used in a foreign state by customers, was declared merely incidental to the main charge and immaterial for the

<sup>71</sup> This has been approved in the Note, 56 Harv. L. Rev. (1943) 298, 303.

<sup>72</sup> Triangle Publications v. New England Newspaper Publishing Co. (D. C. Mass. 1942) 46 F. Supp. 198, 203. The judge was the same as in the case *supra* n. 69.

<sup>73</sup> Vacuum Oil Co. v. Eagle Oil Co. (C. C. D. N. J. 1907) 154 Fed. 867, *supra* Chapter 25 n. 173; see the comment in George W. Luft Co. v. Zande Cosmetic Co. (C. C. A. 2d 1944) 142 F. (2d) 536, 540.

choice of law.<sup>74</sup> This consideration rather than the application of the *lex fori* as such conforms to the most desirable rule. The only practical and theoretically justified solution is furnished by centering the tort in its most characteristic locality. In the case of periodicals this is clearly the publishing house,<sup>75</sup> in that of broadcasting, the office responsible for the radio transmission.

### III. THE PLACE OF INJURY

#### 1. Injury and Damage

In view of the argument popular among European writers that the place where a tort takes effect is a vague and uncertain concept and that such a place may be found all over the world, it is opportune to note the elaborate concept prevailing in the American doctrine and formulated in the Restatement.<sup>76</sup> A tort is localized at the precise place in which it is completed by "harm" to a person or tangible thing, or, in a broader term, by "injury" inflicted on a protected interest. More closely, it is the first invasion of the interest that counts, the intrusion upon bodily integrity, a personal sphere, a land or chattel. Damage may develop from there on in various ways. The harm may increase or vanish, the losses caused may vary and change by proximate or remote consequences, normal or extraordinary combinations of cause and effect, intervening acts of the parties and of third parties.

Thus, once more, the antagonistic theories, referring to the place of acting and that of injury, respectively, partly

<sup>74</sup> *Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co.* (C. C. A. 7th 1941) 124 F. (2d) 706, 709.

<sup>75</sup> This has already been advocated by 2 BAR 120 n. 9; 2 MEILI 96.

<sup>76</sup> Out of insufficient knowledge, RUDOLF SCHMIDT, *Der Ort* etc., *supra* n. 1, at 184 invokes the American example as though it supported the application of the law of the forum in case damage has been suffered there.

agree. The events posterior to the injury do not produce significant local connections. Only the Reichsgericht finds it relevant that a person, bodily injured in state X, incurs medical expenses in state Y, loses wages in Z, and leaves dependents in states L and M. This plain exaggeration has attracted most of the attacks that have been inadvisably directed against the entire doctrine of the Reichsgericht.

The later American cases concerning railway accidents consistently declare immaterial at what place the death of the victim occurs; only the physical impact on the body counts.<sup>77</sup> A drug wholesaler in St. Louis, Missouri, sent ginger extract containing poisonous wood alcohol to a grocer in Oklahoma, who himself drank a bottle, and after having been removed to Missouri, died from the beverage. The court applied the death statute of Oklahoma according to principle.<sup>78</sup> Most other cases follow the same line.<sup>79</sup> A death statute is not construed as intended to apply to persons dying in the state, but to persons harmed there so as to succumb subsequently to the injury. Another consideration is fairness towards the wrongdoer, as his liability possibly would be increased if another law could be substituted after the deed.<sup>80</sup> However, all this is only a confirmation of the result that, in looking for the center of tort, we cannot find it in any event subsequent to the harm done.

Strangely deviating, however, in a well-known case of a passenger boat sinking on the high seas because of negligent

<sup>77</sup> Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260; Crane v. Chicago, etc. R. Co. (1908) 233 Ill. 259, 84 N. E. 222; Centofanti v. Pennsylvania R. Co. (1914) 244 Pa. 255, 90 Atl. 558. See moreover the cases cited by HANCOCK 255 n. 12.

<sup>78</sup> Darks v. Scudders-Gale Grocer Co. (1910) 146 Mo. App. 246, 130 S. W. 430. Another case involving a drug is Moore v. Pywell (1907) 29 App. D. C. 312, 9 L. R. A. (N.S.) 1078 (*infra* n. 97).

<sup>79</sup> See the Annotations to the Restatement § 377, for instance, those of Maryland and Minnesota.

<sup>80</sup> See HANCOCK, "Choice of Law Policies in Multiple Contact Cases," 5 U. of Toronto L. J. (1943) 133, 138.



navigation, it has been held that a passenger drowning in the ocean was not injured on the vessel but on the high seas and that therefore an action lay against the French company under the French death statute, whereas the general maritime law gave no action for death.<sup>81</sup> But even if it had been proved that he jumped overboard to save himself, the injury would have occurred on the vessel. The court required death as the "substance of the injury," instead of regarding death as a mere effect of the injury, a confusion that was frequent in the early construction of death statutes. But if the court had simply applied the French law, which is clear on the point, it would have correctly decided on the theory that the harm was done on the vessel when a passenger was forced to leave it, and that the place of his ensuing death was immaterial.<sup>82</sup> The true rule has been expressed in an analogous case: "The crucial test is, where was the tortious act committed, not where were the damages consummated, . . . although the final injury be completed elsewhere."<sup>83</sup>

Also, the Swiss Federal Tribunal has recognized that, in a suit for seduction of a married woman, the place where the husband suffered mental anguish is immaterial.<sup>84</sup>

A right of privacy is invaded where the "plaintiff's name and X-ray picture first became public property."<sup>85</sup> A libelous letter to be sent to Switzerland produces an injury to the addressee as soon as it is given to a translator.<sup>86</sup>

*Deceit.* However, how can such ulterior damage be excluded from the process of localization when the tort, such as fraud or unfair competition, consists in the invasion of

<sup>81</sup> *Rundell v. La Compagnie Générale Transatlantique* (1900) 100 Fed. 655.

<sup>82</sup> See the correct statement by the Supreme Court on the French law: *La Bourgogne* (1908) 210 U. S. 95, 138.

<sup>83</sup> *Lindstrom v. International Navigation Co.* (C. C. E. D. N. Y. 1902) 117 Fed. 173.

<sup>84</sup> *BG.* (June 15, 1917) 43 BGE. II 309, 316 *sub* 2.

<sup>85</sup> *Banks v. King Features Syndicate* (D. C. S. D. N. Y. 1939) 30 F. Supp. 352.

<sup>86</sup> *Kiene v. Ruff* (1855) 1 Iowa 482, 486.

pecuniary interests? As the writers who attack the Reichsgericht doctrine emphasize, in such a case the injured interest is not located at one place only. The assets of the plaintiff may be dispersed over the whole earth. "Is the plaintiff's estate situated wherever there are assets, or is it at his domicile, following the maxim, *res ossibus inhaerent*?"<sup>87</sup>

The remarkable solution suggested by the Restatement<sup>88</sup> seems to furnish the answer. It concentrates the cause of action for fraud in the place "where the loss is sustained, not where fraudulent representations are made." Beale reached this proposition by construing the case *Keeler v. Ley*<sup>89</sup> as distinguishing the place where the defendant induced the plaintiff to sell his land from the place where he conveyed it,<sup>90</sup> the latter constituting the situs of the tort. The authority is doubtful,<sup>91</sup> but Beale's interpretation is consistent. The most characteristic fact, indeed, is that the plaintiff was swindled out of his property. Raape by an argument *ad absurdum* against the Reichsgericht, rhetorically asks where the effect of the tort should be placed when a plaintiff domiciled in Berlin loses a law suit at a court in Lyons, France, against a Spanish firm, because of perjury of the defendant who was a witness.<sup>92</sup> The Restaters would probably not

<sup>87</sup> RAAPE 203.

<sup>88</sup> Restatement § 377 note 4. This section has been applied, by analogy, by CALLMAN, 2 Unfair Competition and Trade Marks (1945) 1749 § 100.2(a), to cases of trade-mark infringement: the wrong would take place "not where the deceptive labels are affixed to the goods or where the goods are wrapped in the misleading packages, but where the passing off occurs, i.e., where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's." But this is only the place where the deceit of the customer occurs and neither that of the trade-mark infringement nor of unfair competition, cf. *supra* Chapter 25, pp. 295 n. 169, 296.

<sup>89</sup> *Keeler v. Fred T. Ley & Co.* (1931) 49 F. (2d) 872; (1933) 65 F. (2d) 499. On the basis of the Restatement, however, Judge Goodrich, in *Smyth Sales v. Petroleum Heat & Power Co.* (1942) 128 F. (2d) 697, 699 states that in the instant case the sale of plaintiff's business for an inadequate consideration was the loss caused by the deceit and applies the law of the state where the contract of sale has been executed.

<sup>90</sup> 2 BEALE 1287.

<sup>91</sup> RHEINSTEIN, *supra* n. 1, 178.

<sup>92</sup> See RAAPE 203.

hesitate to reply that the injury occurred in Lyons, while all ensuing damages in Spain or Germany would have no influence on localization. It was the mistake of the Reichsgericht to treat injury and damage on the same footing, a view that seems to be abandoned in the latest phases of dealing with unfair competition.<sup>93</sup>

## 2. Injury and Acting

The efforts of the American doctrine to localize the tort have another interesting side. Bodily harm is deemed to be suffered where "the harmful force takes effect upon the body," as when a bullet enters the body.<sup>94</sup> A tort against a piece of land is committed at its situs and against a chattel at the place where it is situated at the moment of the impact.<sup>95</sup> These commendable solutions will in many cases be indistinguishable from the result of a theory of acting at a distance.

A slight divergence between these two theories would occur if poisoning were located (following Beale) "where the deleterious substance takes effect (that is, the poisoned person falls ill) and not where it is administered."<sup>96</sup> This solution, apparently devoid of any case authority, is inconsistent with the principle and highly impractical, nobody being able to state exactly at which moment an already poisoned man falls "ill." But the court in the *Darks* case, mentioned above,<sup>97</sup> directly declined to apply the law of the place where the shipment arrived, namely at the business place of the grocer in Missouri, and applied the law of Oklahoma where the addressee drank from the bottle. The court there followed the traditional rule in express contrast to

<sup>93</sup> 140 RGZ. 25; see *supra* p. 297 and RAAPE, D. IPR 326.

<sup>94</sup> Restatement § 377 Note 1.

<sup>95</sup> *Id.* note 3.

<sup>96</sup> *Id.* note 2; 2 BEALE 1288 cites *Moore v. Pywell*, *supra* n. 78, but this case is anything but clear.

<sup>97</sup> *Darks v. Scudders-Gale Grocer Co.* (1910) 146 Mo. App. 246, 130 S. W. 430; *supra* n. 78.

what we may call the law of the place of distant acting.

*Damage by aircraft.* Where damage is done to a person or property on the surface of the earth by or from an aircraft in flight over the territory of a state, such as by crash landing, falling or thrown objects, including jettison, the place of wrong, if any, cannot be conveniently located except on the territory of the injury done.<sup>98</sup>

#### IV. THE STRUCTURE OF TORTS

##### 1. Liability Without Proof of Fault

(a) *Absolute liability.* In a number of states, the statutory liability of a railway company to a person injured by an accident on its lines is based on the mere fact of carrying on a dangerous activity. That the train has a collision or a derailment then suffices to constitute the cause of action. Whether such a statute intends to protect injured persons rather than to impose on the railroads the necessity of establishing the safest system of equipment, organization, and personnel, is an academic question. Important for localizing the tort is the juridical isolation of the facts composing the cause of action from the human acts and omissions that caused the mishap. Through the technical structure of these torts, the obligation is rendered more independent of its cause, more "abstract," than is an obligation written in a negotiable instrument and thereby separated from its source. The accident alone characterizes the facts of the claim; the harmful conduct vanishes from the picture. For this reason, absolute liability cannot be claimed under any statute other than that of the state where the injurious accident happens.

<sup>98</sup> The national laws, enacted in the 1920's, have been so different as to menace reciprocal application by considerations of public policy, see SCERNI 365. The unification reached by the Rome Convention for the Unification of Certain Rules relating to Damages Caused by Aircraft to Third Parties on the Surface, of May 29, 1933, HUDSON, 6 Int. Legislation 334 No. 329, was a necessary step, but left important matters to conflicts, and has not entered into force.

There is no serious reason, however, why the injured person should not be entitled to request damages under another law for negligence, if this and its place are proved. It should be considered that laws establishing liability without fault very often limit the extent of recovery in contrast with the ordinary tort actions not so limited. In addition to well-known American statutes embodying a similar system, international examples of the modern technique are furnished by the Bern Convention on the Transport of Goods by Rail, whereby the carrier irrespective of fault has to bear a limited responsibility for loss and delay while he has to pay full indemnity for fraud or gross negligence,<sup>99</sup> and the (not yet ratified) Rome Convention of 1933, granting any person injured without his own fault on the surface of a territory by a flying aircraft a limited amount of damage by virtue of the mere fact that "the damage exists and that it was caused by the aircraft," and sets the limit aside, if the damage was caused by gross negligence or wilful misconduct.<sup>100</sup>

(b) *Strict liability*. Between pure liability for fault and absolute liability for damage, modern statutes have adhered to middle systems of varied degrees of requirements. Even at common law there are instances involving the handling of dangerous substances, where the defendant must prove that no commercially practicable precaution was omitted.<sup>101</sup> Such rigid liability, just as the very frequent type of statutory inversion of the burden of proof of negligence, is distinguishable from absolute liability which admits no excuse or only that of act of God, but practically reaches the same result in the great majority of cases. Accordingly, a suit against

<sup>99</sup> Text of 1924, art. 36, MARTENS, *Recueil*, série 3, vol. 19 at 505; text of 1933, art. 36 (HUDSON, 6 *Int. Legislation* at 552).

<sup>100</sup> Arts. 2, 8 and 14 (a), HUDSON, 6 *Int. Legislation* at 336, 338, 340.

<sup>101</sup> See *Owners of the Steamship Pass of Ballater v. Cardiff Channel Dry Docks & Pontoon Co., Ltd.* [1942] 2 All E. R. 79.

an innkeeper, a railroad company, a car owner, a laboratory, allowed to be based on a rebuttable presumption of negligence, needs to be supported by the statutes of the place of injury.

Whether the statutes of this place should be applied only to railroads operating in the state, as the New Hampshire court has asserted in a case as famous as unsatisfactory in principle,<sup>102</sup> may well be questioned. Sparks from a locomotive on the Quebec side of a frontier river set an international bridge spanning the river aflame. The court divided the bridge into separate halves, eliminating the Canadian law (which would govern under the theory of the place of acting) with regard to the American half, but also decided not to apply the New Hampshire statute as not including Canadian railways. Such a restrictive construction of statutes seems inconsistent with the theory of the place of injury.

## 2. Neighborhood Relations

(a) *Flood*. As illustrating the problems arising through vicinity of immovables separated by a state boundary, the case of *Caldwell v. Gore*<sup>103</sup> deserves attention. The defendant as a landowner in Louisiana, according to the local law,<sup>104</sup> owed the upper owners an absolute "servitude" (better expressed, a legal burden) of drainage. Contrary to this legal duty, he built a dam across a shallow depression through which water found a natural drain, and thereby flooded the land of the plaintiff situated upriver in Arkansas. As the law of Arkansas<sup>105</sup> permitted the establishment of a dam, unless unnecessary damage was caused to a neighbor, the petition

<sup>102</sup> *Connecticut Valley Lumber Co. v. Maine Central R. Co.* (1918) 78 N. H. 553, 103 Atl. 263.

<sup>103</sup> (1932) 175 La. 501, 143 So. 387, 144 So. 151.

<sup>104</sup> Louisiana Rev. C. C. art. 660.

<sup>105</sup> *Morrow v. Merrick* (1923) 157 Ark. 618, 249 S. W. 369; *Burel v. Hutson* (1924) 165 Ark. 111, 263 S. W. 57.

for removing the dam was good under Louisiana and bad under Arkansas law. The Supreme Court of Louisiana, applying its own statute, condemned the defendant. Various annotators disagree: whether the problem was one of property, in which case the decision would be a proper application of the *lex situs*;<sup>106</sup> or one relating to tort, justifying the application of the law of the place of injury, that is, Arkansas;<sup>107</sup> or whether Arkansas law should govern as the *lex situs* of the dominant piece of land;<sup>108</sup> or the *lex fori* should apply.<sup>109</sup> The following approach is suggested.

Among the landowners of the state, the Louisiana statute declared the building of the dam unlawful. A contravention would support an action for restitution of enjoyment and damages for the obstruction, an action seemingly based on the law of real ownership, after the model of the Roman *actio confessoria*, without resorting to tort principles.<sup>110</sup> But even where the action for damages is construed as a tort action, as in most modern systems, the solution depends on the existence of a limitation to the ownership of the servient estate, which naturally is governed by the *lex situs* of this latter.<sup>111</sup> Hence the only problem for the court should have been whether the statutes gave rights also to landowners outside the state. This could have been reasonably denied in view of the lack of reciprocity by the neighboring states. Foreseeing such cases, Bar denied the limitation on ownership under the law of a state by which a reciprocal limitation would not be recognized.<sup>112</sup> But the Louisiana court chose the most

<sup>106</sup> Note, 7 Tul. L. Rev. (1933) 269.

<sup>107</sup> Note, 32 Col. L. Rev. (1932) 1426.

<sup>108</sup> Note, 81 U. of Pa. L. Rev. (1933) 466.

<sup>109</sup> ROBERTSON, Characterization 228 n. 24.

<sup>110</sup> Cf. French C. C. art. 640; Vidrine v. Guillory (1925) 3 La. App. 462; see also 6 La. Dig. (1918) Servitudes 692 §§ 25, 26.

<sup>111</sup> Restatement § 231; 2 ZITELMANN 317, 328ff. requires that both laws involved establish the limitation.

<sup>112</sup> 1 BAR 629 n. 14; 2 *id.* 114 n. 1.

liberal construction and thereby left no room for consulting the law of the damaged immovable. The place of acting alone was decisive. Hence, in the converse case, a Louisiana landowner injured by changes in Arkansas land has no actionable cause, the defendant's act being lawful.

(b) *Mine damage*. In an old case,<sup>113</sup> the Reichsgericht dealt with a mine situation in Brunswick. As an effect of digging a gallery shaft, the water sources of an adjacent area in the territory of the Prussian Mining Law were dried up. The two laws established different periods of limitation for the action for damages. The court reversed a decision applying the Prussian Mining Law and held that the acts complained of were accomplished exclusively in Brunswick, under whose law the mine was operated, and did not go beyond this territory, even though damage affected land in another jurisdiction. This decision has been regarded as contradicting the Reichsgericht rule that allows the injured to base his claim on the law of the place of the injury,<sup>114</sup> but the situation is special. Mine laws are strictly territorial, not intended to be applied to foreign mines or soil. They decide the lawful or unlawful nature of acts as well as the liability for risk. This seems to be the right decision for any country.

### 3. Fault

In contrast with liability *per se*, the tort action supported by the evidence of a faulty act has the possible double local contact of the act and the injury, if not several more provided by partial acts leading to the injury.

(a) *Intentional acts*. An actor who intends to inflict the injury (*dolus directus*) or foresees the harmful effect as possible and approves of it in case it should occur (*dolus*

<sup>113</sup> RG. (Feb. 6, 1889) 44 Seuff. Arch. 257; followed by OLG. Köln (April 21, 1914) Leipz. Z. 1914, 1140: damage by a Dutch mine to a Prussian building.

<sup>114</sup> RAAPE 203, but see 207 No. 5.



*indirectus*), manifestly deserves to have his act treated as tortious under both the law of the place where the act is intended to have effect as well as at the place where it reaches its effect. The law under which he physically acts will ordinarily cover no more than an ineffective part of the facts.

(b) *Negligence*. If the injury is not intended, but the act is intended to reach another territory, such as a letter, a newspaper, a broadcast, a shipping of goods, the result should be judged according to the law of that territory. Doubts are possible when a negligent person does not, and particularly when he cannot, reasonably foresee that his behavior will have harmful consequences in other jurisdictions. However, apart from the conflicts rules on tort, it should be considered that in any modern municipal tort law the court does not assume negligence unless a prudent person in the situation of the acting person would regard the injury—not the damage<sup>115</sup>—as lying within the normally possible consequences of the act. Time and place are an essential part of the circumstances to be envisaged in this hypothetical judgment.

## V. CONCLUSION

The number of jurisdictions with which the facts of a tort may be locally connected, much extended in the opinion of German courts, is considerably reduced if we eliminate on one hand all preparatory acts, such as, in the case of defamation, the writing and dispatching of letters and bodily movements designed to affect objects at another place and, on the other hand, the effects of a completed injury, such as, in the case of personal harm, death and pecuniary losses. Choice of law, consequently, is limited to the contacts realized by:

<sup>115</sup> See RABEL, *Das Recht des Warenkaufs* 504, against GOODHART, *Essays in Jurisprudence and the Common Law* (1931) 113ff.

- (a) The completion of tortious acts;
- (b) Injury, i.e., the invasion of interests.

The traditional American rule following the latter local connection is essentially nearer to this view than any other present conflicts law. The two places indicated, in fact, are in most cases identical.

Considering, however, that these places are different in significant cases, it would seem desirable to stress one or the other local connection according to the characteristics of the various liabilities. We have found that tort claims based on the right of vicinity or on mining law ought to be determined by the law of the place where the physical act is done. This represents a group of liabilities based on local restrictions to the freedom of acting. On the other hand, absolute and rigid liabilities for damages should be exclusively governed by the law of the place where the injury has been suffered. This does not exclude, in addition, giving an injured person an option between the liability for risk at the place of the injury and a liability for negligence otherwise localized and correspondingly governed.

Indeed, as a general rule, intentional torts and negligence are subjected most conveniently to the law of the place where tortious acting at a distance is completed, even when an injury ensues only at another place. The defect of an automobile or of a machine originating in a factory in state X may be the object of a tort action based on the fault committed in X, but such negligence cannot properly be said to have been committed in state Y, if it causes harm there. Nevertheless, the injury in Y may raise an action on the ground of mere risk under the law of Y.

Numerous groups of torts, however, need special localizations, according to their most characteristic territorial connections. Thus, fraud has been aptly localized by the Restaters at the place where the deceived person delivers

his assets. Torts committed by press or radio should be governed by the law of the publishing house or the broadcasting office directing the transmission. Unfair competition by misappropriation has been correctly held to be subject to the law of the state in which the most essential part of the wrongful behavior takes place.

Giving paramount importance to the place of "injury," we cannot reach in all cases the same results as through this individualizing method. Moreover, the American theory has necessitated in the Restatement a separate treatment of the question of lawfulness. Exceptions of this kind will be easily avoided, when the governing law is selected more carefully and, under this law, the local contacts of the particular case are duly evaluated for judging the guilt of a defendant acting in the province of a foreign law.

More individual answers to single problems would be desirable. The courts presumably would more readily follow rules appropriate to particular situations than a radical change which, in this country, does not seem warranted.

## CHAPTER 27

# Maritime and Aeronautic Torts<sup>1</sup>

### I. SURVEY OF PRINCIPLES

#### 1. "General Maritime Law"

**E**NGLAND. English courts until 1862 applied the ordinary British rules of navigation to collisions of any ships occurring in British waters or involving two British ships on the high seas. They followed somewhat different rules of seamanship if a collision took place between a British and a foreign, or two foreign ships, on the high seas. The latter rules were assumed to be common to seamen of all nations, a "general maritime law," though administered in special form in England.<sup>2</sup> The duality of "British" and "general maritime" rules was abolished by the Merchant Shipping Act Amendment Act of 1862 providing that all ships, British and foreign, should be judged by British law with reference to the rule of the road and the extent of the owner's liability.<sup>3</sup> Since then, the English statutory law is the expression of the "general" law of maritime torts.<sup>4</sup>

<sup>1</sup> The abundant literature on *collision*—French *abordage*, German *Schiffszusammenstoss*, Italian *urto di navi*, Portuguese *abalroação*—contains many contributions to conflicts law, of which the most useful at present are the following: MARSDEN, *The Law of Collisions at Sea* (ed. 9 by Gibb, 1934) Ch. IX, 209-224; (Anonymous) *Abordage maritime*, 1 *Répert.* (1929) 38; FRITZ FISCHER, *Der Schiffszusammenstoss im Deutschen Int.Priv.R.* (Diss. Hamburg 1937); MARIO SCERNI, *Il Diritto Int. Priv. Marittimo* (ed. Aeronautico 1936) 299-308.

Conflicts problems with respect to *air navigation* have been studied by FERNAND DE VISSCHER, "Les concours de lois en matière de droit aérien," 48 *Recueil* (1934) II 279. "Largely conjectural rules" for English conflicts law have been suggested by MCNAIR in Winfield, *Text-Book of the Law of Tort* (ed. 2, 1943) 197.

<sup>2</sup> The Dumfries (1857) Swab. 63, 125.

<sup>3</sup> 25 & 27 Vict., c. 63, ss. 54 and 57.

<sup>4</sup> *Chartered Mercantile Bank of India v. Netherlands India Steam Naviga-*

The persistent conception of a general maritime law represents a survival of the ancient idea that the law merchant, of which the maritime law is a branch, was uniform throughout the civilized world, different interpretations by different courts notwithstanding. It is significant that this idea has survived the breaking up of the former unity of the Christian world for a longer time in the English speaking countries than in the narrow horizons of Continental Europe, where reminiscences are found only in famous old texts.<sup>5</sup> Nevertheless, the Supreme Court of the United States has made it very clear that "the general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof."<sup>6</sup> But the rules of navigation on the high seas found a new and broad unification when the experiences of British seafaring were used throughout the world in laws and treaties after the British model, and the international conferences were reflected in the British enactments.

Insofar as there remain differences, English courts apply British rules. The chief principle is said to consist in the duty of navigating vessels so as not to cause damage to the life and property of others.<sup>7</sup> With respect to the obligations of the shipowner, his liability under English law for the negligence of master or crew is considered mandatory, whatever a foreign law of the flag may ordain.<sup>8</sup> Moreover, in all cases of collision either in British waters or on the high seas, the limit of the owner's responsibility is regarded as deter-

tion Co. (1883) 10 Q.B.D. 521, 537 per Brett, L.J.; *The Belgenland* (1885) 114 U.S. 355, 366.

<sup>5</sup> See LYON-CAEN in *Clunet* 1882, 600; DIENA, 3 *Dir. Com. Int.* 425, 1; WESTLAKE § 202 (a).

<sup>6</sup> *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.* (1888) 129 U.S. 397, 444.

<sup>7</sup> *Submarine Telegraph Co. v. Dickson* (1864) 15 C. B. N.S. 759, 779 per Willes, J.

<sup>8</sup> *The Leon* (1881) 6 P.D. 148 per Sir R. Phillimore.

mined by the Merchant Shipping Act, 1894, s. 503. Thus, it has been held that the owners of a British ship in collision with a foreign ship on the high seas were liable only to the limited extent prescribed by the statutory English law, and that international law was not violated, since the owners of any foreign vessel, too, in a similar case are entitled to the benefit of the Act.<sup>9</sup> The British rule concerning the division of loss by collision is applied to all vessels everywhere.<sup>10</sup>

*United States.* The doctrine of general maritime law has been adopted in the federal courts exercising admiralty jurisdiction in this country, especially in cases of collisions between any vessels on the high seas. Also limitation of liability prescribed in acts of Congress is regarded as a part of the "general maritime law as administered by the admiralty courts of the United States."<sup>11</sup> And in a proceeding for such limitation, the speed a vessel has been allowed to run in a fog is determined "by international usage as understood and applied in the forum."<sup>12</sup> On the reason for preferring this part of the American law to any other law, in the case of *The Scotland* (1881) Mr. Justice Bradley alluded to the situation on the high seas "where the law of no particular state has exclusive force, when two ships of different nationality collide,"<sup>13</sup> but in 1914 Mr. Justice Holmes speaking for the Supreme Court shifted the emphasis to public policy as laid down in the federal statutes.<sup>14</sup>

Modern writers in England,<sup>15</sup> as well as in the United

<sup>9</sup> *The Amalia* (1864) Br. & Lush. 151, 1 Moo. P.C.Cas. (N.S.) 471.

<sup>10</sup> This is true for Admiralty as well as the common law jurisdiction, MARSDEN 218 *ad n.* (e).

<sup>11</sup> *The Scotland* (1881) 105 U.S. 24, 29; *The Titanic* (1914) 233 U.S. 718, *cf.* 2 BEALE 1331.

<sup>12</sup> *La Bourgogne* (1908) 210 U.S. 95, 116, 140.

<sup>13</sup> 105 U.S. at 29.

<sup>14</sup> 233 U.S. at 733.

<sup>15</sup> Lushington, J., in *The Milford* (1858) Swab. 362, 166 Eng. Re. 1167; WESTLAKE 276; CHESHIRE 307.

States,<sup>16</sup> soberly state that "there is no such law" as a general maritime law and that, all things considered, it is but another name for the *lex fori*, although it has grown out of a world-wide traffic and a millennial history. In the United States its scope has been somewhat narrowed.

Collision is the historic prototype of a tort committed on the water. That the same problematic general maritime law should govern other torts also, seems to have been implied in an English leading case where a submarine cable (before the International Cable Convention and the Submarine Telegraph Act, 1885) was injured at the bottom of the sea by the anchor of a navigating ship.<sup>17</sup> While Dicey advocated this solution,<sup>18</sup> Cheshire contests it as unnecessarily enlarging the scope of English law.<sup>19</sup>

## 2. Modern Principles

The International Maritime Congress held in Antwerp in 1885 approved the following conflicts rules on collision of ships:

Collisions in ports and internal waters should be governed by the *lex loci*, for both formalities (such as demurrers, time limitations, prescription) and substantive rules, irrespective of the nationality of the vessels.

The master of a ship suffering from a collision on the high seas may preserve its rights by observing the form and time prescribed (for protest or action) either by the law of his flag, or that of the flag of the offending ship, or that of the first port of refuge.

In the case of collision on the high seas, each ship is liable

<sup>16</sup> 2 BEALE 1331; HANCOCK 259 n. 3. See also the criticism by DIENA, 3 Dir. Com. Int. 424 § 281; CROUVÈS, 1 Répert. 42 Nos. 12, 13.

<sup>17</sup> Submarine Telegraph Co. v. Dickson (1864) 15 C. B. N. S. 759.

<sup>18</sup> DICEY 783; approved by WINFIELD, Text-Book on the Law of Tort (ed. 2, 1943) 196.

<sup>19</sup> CHESHIRE 309.

within the limits of the law of its flag, without being entitled to more than this law grants.<sup>20</sup>

These rules have been fully adopted in the Codes of Portugal and Bulgaria.<sup>21</sup> The first rule has been accepted everywhere in civil law countries with the exception that certain courts have applied the law of the forum to the formal requisites of actions.

On the high seas, the basic rule in civil law countries is in favor of the law of the flag whenever a tort can be localized on a vessel. In the case of collisions between two vessels of different flags, some courts have earnestly tried to find such a localization and have become resigned to the law of the forum only when it seemed inevitable, because the two laws involved appeared equally competent to govern and could not be meaningfully combined.

Entirely isolated, the Soviet Maritime Law of 1929 prescribes the application of the domestic law to all collisions wherever occurring.<sup>22</sup>

## II. UNIFICATION OF SUBSTANTIVE LAWS

*Collision.* The municipal law on collisions on the high seas has been internationally unified in important aspects by the "International Convention for the Unification of certain Rules concerning Collision" of Brussels (September 23, 1910).<sup>23</sup> Before the outbreak of the second World War, the following countries were members:

Argentina, Austria, Belgium, Brazil, Denmark, Danzig,

<sup>20</sup> 1 *Revue Int. Dr. Marit.* 427.

<sup>21</sup> Portugal: C. Com. art. 674.

Bulgaria: C. Marit. of Jan. 6, 1908, art. 189.

<sup>22</sup> Soviet Russia: Law of June 14, 1929, art. 4 (d); see FREUND, 95 *Zeitschrift für das gesamte Handelsrecht* (1930) Beilage 70.

<sup>23</sup> MARTENS, *Recueil*, 3rd Series, VII, 711; cf. RIPERT, 3 *Droit Marit.* (ed. 2) § 2063.



Finland, France, Germany, Great Britain, Dominions and Colonies, Greece, Hungary, Italy, Japan, Mexico, the Netherlands, Nicaragua, Norway, Poland, Portugal, Rumania, Russia, Spain, Sweden, Uruguay.

Also bilateral treaties are in force between numerous countries.

The Convention, however, does not apply to collisions involving vessels of nonparticipant states,<sup>24</sup> including the United States which signed but did not ratify the Convention; does not deal with state ships;<sup>25</sup> and is restricted to the case where at least one vessel is plying on the high seas.<sup>26</sup> The national laws remain for the time in force also with respect to liability for compulsory pilots<sup>27</sup> and the scope and effects of contractual or legal provisions limiting the liability of shipowners to persons on board.<sup>28</sup> In all these respects, there exist conflicts problems, but they often are mitigated by the strong influence of the Convention on recent legislation.

*Navigation.* On the other hand, the navigation rules have followed a vigorous trend of unification. International regulations of 1897, 1905, and 1927, largely adopting the experiences of Great Britain, have succeeded in attaining a high degree of uniformity.<sup>29</sup>

*Aerial law.* Parallel to the endeavors of the *Comité Maritime*, the *Comité International Technique d'Experts Juridiques Aériens* (CITEJA) has succeeded in obtaining

<sup>24</sup> Art. 12 par. 2 (1).

<sup>25</sup> Art. 11.

<sup>26</sup> Art. 1.

<sup>27</sup> Art. 5.

<sup>28</sup> Art. 4 par. 4. See also the reservation in art. 7 par. 3.

<sup>29</sup> At present, see in particular Regulations for Preventing Collisions at Sea, Annex II, to the Convention of London, May 31, 1929, on Safety of Life, HUDSON, 4 Int. Legislation 2825; and the British Merchant Shipping (Safety and Load Line Conventions) Act, 1932, 22 & 23 Geo. 5, c. 9 Sched. 1.

a few very useful, though fragmentary, conventions. The conventions of Warsaw, October 12, 1929, on transport,<sup>30</sup> in which the United States participates, and of Rome, May 29, 1933 (not yet ratified), on damage done to third parties on the surface of the earth,<sup>31</sup> unify a part of the liability problems. But the remaining conflicts are even more important and less well worked out than the traditional maritime questions. The Warsaw Convention itself simply envisages the application of the *lex fori* to the treatment of contributory negligence, the possibility of paying periodical amounts of damages, the concept of gross negligence, and other problems.<sup>32</sup>

### III. TORTS DONE WITHIN A STATE TERRITORY

#### I. Torts in Territorial Waters

The territory of a state, according to the predominant opinion, includes in addition to ports, rivers, and channels, "a belt of sea,"<sup>33</sup> the coastal seas of a certain mileage.

(a) *Rule.* The universally settled rule calls for the application of the law of the state to which the waters belong.<sup>34</sup> In England, this rule is not unequivocally settled with respect to foreign waters, but seems now to prevail over the doctrine of "general maritime law."<sup>35</sup>

<sup>30</sup> Convention for the Unification of Certain Rules regarding International Air Transport, HUDSON, 5 Int. Legislation 100, U.S. Treaty Series No. 876.

Great Britain: Carriage by Air Act, 1932, 22 & 23 Geo. 5., c. 36.

<sup>31</sup> Convention for the Unification of Certain Rules relating to Damages Caused by Aircraft to Third Parties on the Surface, HUDSON, 6 Int. Legislation 334.

<sup>32</sup> Arts. 21, 22, 25, 28, 29.

<sup>33</sup> Articles provisionally approved at the Hague Conference on International Law, 1930, see Am. J. Int. Law 1930, Supp. 239.

<sup>34</sup> United States: *Smith v. Condry* (1843) 1 How. 28; *The Albert Dumois* (1900) 177 U.S. 240; Restatement § 404. See citations *infra* n. 40.

<sup>35</sup> This has been concluded from the dicta of Brett, then L. J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B. 521, 537 (C.A.) and Mellish, L. J., in *The Mary Moxham* (1876) 1 P. D. 107, 111, 113. See MARSDEN 215; CHESHIRE 305.

*Illustration.* After the English Pilotage Act, 1913, came into force, in which the liability of a shipowner for fault of a compulsory pilot was recognized (and no longer considered to be against public policy, as it was deemed to be in *The Halley*<sup>36</sup>), a suit was dismissed in the case of a foreign pilot whom the ship was compelled to take on but for whose fault the shipowner was not responsible under the local law.<sup>37</sup>

The territorial law governs the wrongs committed on board a vessel,<sup>38</sup> as well as those inflicted through faulty navigation,<sup>39</sup> and has its particular and oldest application in cases of collisions of ships in territorial waters.<sup>40</sup>

<sup>36</sup> See *supra* pp. 242, 276.

<sup>37</sup> *The Arum* [1921] P. 12.

<sup>38</sup> *Uravic v. Jarka Co.* (1931) 282 U.S. 234, opinion of Mr. Justice Holmes (a stevedore killed on board a German vessel in New York harbor); cf. *HANCOCK* 262.

<sup>39</sup> Restatement § 407.

<sup>40</sup> United States: Restatement § 409; *The Albert Dumois* (1900) 177 U.S. 240 (domestic waters); *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro* (D. C. E. D. N. Y. 1928) 31 F. (2d) 757; *Standard Oil Co. of New York v. Tampico Nav. Co.* (D. C. E. D. N. Y. 1921) 21 F. (2d) 795 (foreign waters).

Treaty of Montevideo on Commercial Law (1889) art. 11; text on Commercial Navigation (1940) art. 5.

Código Bustamante, arts. 290, 291.

Belgium: App. Bruxelles (Nov. 21, 1884) *Pasicrisie* 1885.2.39 and many other cases (domestic waters); Trib. com. Antwerp (March 4, 1853) *Jur. Port Anvers*, 1857.1.267 and many other cases, see 1 *Répert.* 73 Nos. 172-174 (foreign waters); Trib. Antwerp (Jan. 23, 1936) 36 *Revue Dor* (1937) 158, *Jur. Port Anvers* 1936, 197.

Bulgaria: C. Marit. of Jan. 6, 1908, art. 189.

Denmark: Trib. Marit. Copenhagen (May 31, 1905) *Clunet* 1907, 1178.

Egypt: Trib. civ. Alexandria (Feb. 2, 1926) 17 *Revue Dor* 328; see also Trib. com. Alexandria (March 4, 1929) 20 *Revue Dor* 237.

France: Cass. (civ.) (July 18, 1895) S. 1895.1.305, *Clunet* 1896, 130; Cass. (req.) (Feb. 15, 1905) S. 1905.1.209, *Revue* 1905, 114, 128, *Clunet* 1905, 347; App. Rouen (June 26, 1907) *Clunet* 1908, 776. The cases refer to domestic waters only, because the courts refuse jurisdiction as to foreign waters. The rule, however, is recognized to extend to these in the literature, see 6 *LYON-CAEN et RENAULT* 192 §§ 1048 to 1051 (despite personal opposition); *ROLIN*, 3 *Principes* § 1071; *PILLET*, 2 *Traité* § 551; 1 *Répert.* 67 No. 143.

Germany: RG. (May 30, 1888) 21 *RGZ.* 136; (Feb. 18, 1929) *IPRspr.* 1930 No. 59 (domestic waters); (July 12, 1886) 19 *RGZ.* 7; (June 25, July 9, 1892) 29 *RGZ.* 90 (foreign waters); OLG. Hamburg (April 17, 1907) *Hans. GZ.* 1907, HBl. No. 73. Cf. RG. (July 1, 1896) 37 *RGZ.* 181 (fluvial waters).

According to universal custom, usually followed also in the United States, the rule does not cover, however, the internal management and discipline of a ship which, instead, is governed by the law of the flag the vessel flies.<sup>41</sup> The idea is that torts, like contracts creating obligations between the owner, the shipmaster, the officers and the crew, are subject to the individual law of the vessel. Ordinarily, port authorities also refrain from taking jurisdiction in such matters.<sup>42</sup>

Through this important restriction on the local legal order, the troublesome question regarding the subjection of foreign warships to the private law of the territory is to a large extent eliminated. For the rest of the problems, the ordinary rules on immunity from territorial jurisdiction are observed.<sup>43</sup> The liability of state vessels, employed in the transport of passengers or cargoes, has been defined by an international convention,<sup>44</sup> in which the United States does

Italy: As in France, Cass. (July 19, 1938) *Foro Ital.* 1938 I 1216, 7 *Giur. Comp. DIP.* 307 No. 161. Jurisdiction is not taken as to foreign vessels in foreign waters, Cass. (Jan. 16, 1939) *Giur. Ital.* 1939 I 1264.

The Netherlands: H.R. (June 24, 1927) *W.* 11704, 17 *Revue Dor* 522, Rb. Rotterdam (Feb. 8, 1939) *W.* 739.

Norway: S. Ct. Christiania (Dec. 15, 1905) *Clunet* 1907, 852, 23 *Revue Int. Dr. Marit.* 128 (Canal of Kiel, German law).

Portugal: C. Com. art. 674.

<sup>41</sup> *Grand Trunk R. Co. v. Wright* (C. C. A. 2d 1928) 21 F. (2d) 814, 815; see for other cases *Restatement* § 405; 2 *BEALE* 1328 § 405.1; *HANCOCK* 264 n. 7 who notes, however, a few contrary decisions. An exception has been recently made by majority vote in a case where a Greek seaman signed on a Greek vessel in a United States port and was injured in United States territorial waters, *Kyriakos v. Goulandris* (C. C. A. 2d 1945) 1945 *Am. Marit. Cas.* 1041; *Judge Learned Hand* (at 1052) dissenting, urged the long list of precedents.

*Treaty of Montevideo on Commercial Law of 1889*, art. 20; text on *Commercial Navigation of 1940*, art. 21.

<sup>42</sup> *Treaty of Montevideo*, Draft on *Commercial Navigation of 1940*, arts. 22, 23. Preparation for an international convention on penal and civil jurisdiction in the matters of navigation and collision was started by the International Maritime Committee; instructive reports have been printed in the *Publications of the Committee*, Nos. 98-102.

<sup>43</sup> Cf. BALDONI, "Les navires de guerre dans les eaux territoriales étrangères," 65 *Recueil* (1938) III 185.

<sup>44</sup> *Convention concerning the Immunity of State-Owned Vessels*, Brussels,

not participate. That the Soviet Russian State acting through its commercial agencies is not exempted from liability has been declared in several countries.<sup>45</sup> Commercial vessels chartered by a state but not commanded by a captain appointed by the government, are not held exempt from attachment and still less is the owner free from action for damages.<sup>46</sup>

(b) *Exceptions.* By analogy to the preference given in some quarters to a national law common to plaintiff and defendant in tort actions, it has been assumed in a few instances that the law of a flag flown by both vessels involved should govern torts even in territorial waters.<sup>47</sup>

The contrary opinion, however, prevails universally. It is supported by the territorialism obtaining in tort matters, as well as by the fact that the shipowners are not the only interested persons; passengers, affreighters, and insurers of ship or cargo or passengers share the risk.<sup>48</sup> German courts, however, inconsistently have resorted to the common national law in the case of two German vessels colliding in foreign waters.<sup>49</sup>

## 2. Collision of Aircraft Flying over State Territory

By no means a matter of course, it has nevertheless been

of April 10, 1926, and Additional Protocol of May 24, 1934, 176 L. of N. Treaty Series 199, HUDSON, 3 Int. Legislation 1837 and 6 *id.* 868.

<sup>45</sup> See French Cass. (req.) (Dec. 15, 1936) *Revue Crit.* 1937, 710; *cf.* in general, Cass. (req.) (Feb. 19, 1929) S.1930.1.49 and Note, NIBOYET; *cf.* for contracts, Ital. Cass. (Aug. 3, 1935) *Giur. Ital.* 1936 II 109, *Rivista* 1935, 372. See later cases in *Annual Digest* 1938-40, 237, 246f., 249.

<sup>46</sup> RG. (May 16, 1938) 157 RGZ. 389 explaining Continental, British, and American concepts.

<sup>47</sup> France: VALÉRY § 979 n. 2.

Norway: S. Ct. (1923) cited by CHRISTIANSEN, 6 *Répert.* 582 No. 187.

Código Bustamante, art. 289, Convention of Brussels, *supra* n. 23, art. 12 par. 2 (2).

<sup>48</sup> See ARMINJON, 2 *Précis* § 122.

<sup>49</sup> OLG. Hamburg (Feb. 7, 1913) *Hans GZ.* 1913, HBL. 117 No. 52; (March 19, 1915) *id.* 1915, HBL. 139 No. 69; see also (Nov. 12, 1906) *id.* 1906, HBL. 312 No. 154 (river boats).

categorically recognized by the international conventions on air navigation "that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters."<sup>50</sup> It follows that collisions between two airplanes occurring in the air over a state territory are subject to the law of this state.<sup>51</sup>

That damage done by an aircraft to third persons on the surface of the earth is governed by the law of the territory has been noted earlier.<sup>52</sup>

#### IV. TORTS ON THE HIGH SEAS

##### I. Torts on Board One Vessel

According to a universally settled rule, a tortious act done on board a vessel on the high seas, whereby only persons or property on board are injured, is governed by the law of the flag the vessel flies.<sup>53</sup> This rule covers personal injuries sustained by seamen on the high seas,<sup>54</sup> including American seamen on foreign-owned vessels.<sup>55</sup> Hence, a Yugoslav seaman on a Yugoslav vessel, even during the wartime occupation of that country, could not ask for relief under the American Seamen's Act for injury he suffered on board.<sup>56</sup>

In England, it is discussed whether the analogy of wrongs

<sup>50</sup> Pan-American Convention on Commercial Aviation, of February 20, 1928, art. 1. HUDSON, 4 Int. Legislation 2354, 2356; conforming to Convention of Paris (1919) art. 1; Ibero-American Convention of Madrid (1926) art. 1; preamble to the British Air Navigation Act, 1920.

<sup>51</sup> SCERNI 367 and cited authors, rejecting the exception made by others in favor of the national laws common to both aircraft.

<sup>52</sup> Pan-American Convention on Commercial Aviation, of Feb. 20, 1928, art. 28, HUDSON, 4 Int. Legislation 2365. *Supra* p. 328 and n. 98.

<sup>53</sup> United States Federal Death Act, 1920, 41 Stat. 537 c. 111 § 4, 46 U. S. Code (1934) § 764 (summarizing the conflicts rule); Restatement § 406; *The Titanic* (1914) 233 U. S. 718.

<sup>54</sup> *Petter Lassen* (D. C. N. D. Cal. 1939) 29 F. Supp. 938: Norwegian fireman on Danish vessel time-chartered to an American company, Danish law.

<sup>55</sup> *Hogan v. Hamburg American Line* (1934) 152 N. Y. Misc. 405, 272 N. Y. Supp. 690.

<sup>56</sup> *Radovic v. Prince Pavle* (D. C. S. D. N. Y. 1942) 45 F. Supp. 15.

done in a foreign country must be followed by requiring that a maritime tort be actionable by English law.<sup>57</sup>

*Aircraft.* It is an open question whether the rule should be transferred to tortious acts committed on an aircraft flying over the high seas or such territories as the North Pole. Although it is well settled that aircraft, too, have nationality, Fernand de Visscher has pointed out that in actual practice the commercial airlines of many nations use the same fields and the parties dealing with them do not care about the flag, except in the case of contractual obligations subjected to the law of the flag by express stipulation. As the Warsaw Convention on Air Transport confines lawsuits to either the principal business place of the carrier or the place of destination, at the election of the victim, de Visscher thinks it would be in the spirit of the Convention to apply the law of the forum of the court seized.<sup>58</sup> In the United States, courts have been able to apply the Federal Statute concerning Death on the High Seas by Wrongful Act to airplane accidents on the high seas.<sup>59</sup>

## 2. Collision

Where two vessels flying the same flag collide on the high seas, most courts apply the law thus common to the vessels.<sup>60</sup> As in this case no other law is in competition, this

<sup>57</sup> In contrast to DICEY 778, CHESHIRE 306 hypothetically denies the requirement. For the latter view HANCOCK 269 invokes the precedent of *The Halley*, *supra* p. 242.

<sup>58</sup> FERNAND DE VISSCHER, 48 *Recueil* (1934) II at 335.

<sup>59</sup> 46 U. S. Code §§ 761ff.; *Choy v. Pan-American Airways Co.* (1941) Am. Marit. Cas. 1941, 483; *Wyman v. Pan-American Airways, Inc.* (1943) 181 N. Y. Misc. 963, 43 N. Y. Supp. (2d) 420.

<sup>60</sup> Restatement § 410 (a); *The Eagle Point* (1906) 73 U.S.C.C.A. 569, 142 Fed. 453; dicta in *The Scotland* (1881) 105 U. S. 24, 31; *The Belgenland* (1885) 114 U. S. 355, 369.

Bulgaria: C. Marit., art. 189.

France: RIPERT, 3 *Droit Marit.* 21 § 2074; 6 LYON-CAEN et RENAULT § 1050.

Germany: RG. (Nov. 18, 1901) 49 RGZ. 182 (holding that Danish and

principle is the best possible and has appropriately been extended to vessels whose flags are different but whose laws are essentially the same.<sup>61</sup>

English courts, however, apply their "general maritime law" also in this case.<sup>62</sup>

The case where two vessels, flying the flags of different countries, collide on the high seas, is desperate. None of the familiar contacts is suitable when no territory is affected and the connections established by the flags neutralize each other. Among the innumerable strained attempts to reach a solution, the following have been supported by various authorities:

(i) The Montevideo Treaty of 1889 on Commercial Law provided that the law of the flag more favorable to the defendant should be applied.<sup>63</sup>

(ii) Another opinion distinguishes whether both vessels have violated the rules of navigation or only one of them is to blame. In the latter case, the law applicable would be that of the vessel at fault.<sup>64</sup> Where both are found to be guilty of fault, opinions are divided; each vessel should pay 50 per cent of the damages to which it would be liable

Norwegian laws are essentially the same); RG. (Nov. 12, 1932) 138 RGZ. 243 at 245.

Italy: BOLAFFIO, C. Com. 931; DIENA, 2 Princ. 354.

Portugal: C. Com. art. 674 No. 2.

Treaty of Montevideo on Commercial Law (1889) art. 12, sent. 1; Código Bustamente, art. 292.

<sup>61</sup> United States: Dicta in *The Scotland* (1881) 105 U. S. 24, 29; *The Belgenland* (1885) 114 U. S. 355; *The Presidente Wilson* (D. C. D. Mass. 1929) 30 F. (2d) 466.

Germany: 49 RGZ. 182, *supra* n. 60.

<sup>62</sup> Brett, L. J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521, 537.

<sup>63</sup> Art. 12 sent. 2; probably this is also the meaning of the Treaty of 1940, on Commercial Navigation, art. 7.

<sup>64</sup> Congress of Genoa (1892) art. 7, see 8 *Revue Int. Dr. Marit.* 181.

France: PILLET, 2 *Traité* § 551; CRÉMIEU, 5 *Répert.* 493 No. 21.

Germany: RG. (July 6, 1910) 74 RGZ. 46; overruled (Nov. 12, 1932) 138 RGZ. 246, *infra* n. 71.



under its own law and 50 per cent of those imposed by the other vessel's law,<sup>65</sup> or liability is divided *ex aequo et bono*,<sup>66</sup> or the law of the forum is applied.<sup>67</sup>

(iii) More generally, as a consequence of the allegedly general principle that the national law of the debtor or the defendant should prevail, it has been advocated that each vessel's liability should be determined in accordance with the law of its own flag.<sup>68</sup>

(iv) In 1885, the Institute of International Law and the Congress of Antwerp advocated the rule that a vessel should be liable only when it would be liable under both laws concerned.<sup>69</sup> This rule has found a following.<sup>70</sup>

(v) The German Supreme Court, in a recent decision, has attempted to apply to collisions on the high seas the theory of that court that every place where a substantial element of a tort occurs is a place of wrong. Thus, since the vessel whose crew is guilty of fault as well as the vessel which has been damaged through such fault, are places of

<sup>65</sup> Código Bustamante, art. 294.

<sup>66</sup> Congress of Genoa (1892) art. 7.

<sup>67</sup> See below n. 76.

<sup>68</sup> United States: Judge Learned Hand in *The James McGee* (1924) 300 Fed. 93; Note, 25 Col. L. Rev. (1925) 96; *The Aquitania* (1924) Am. Marit. Cas. 1924, 1440; *Powers v. Cunard S. S. Co.* (1925) 32 F. (2d) 720.

England: *Davidson v. Hill* [1901] 2 K. B. 606.

France: App. Rennes (Dec. 21, 1887) Clunet 1888, 80, affirmed on other questionable grounds, Cass. (civ.) (Nov. 4, 1891) Clunet 1892, 153; Cass. (civ.) (Nov. 7, 1904) 20 Revue Int. Dr. Marit. 517. The courts decide the question of fault under French law reputed to be universally good and in the case of fault apply varying tests. 6 LYON-CAEN et RENAULT 1050, 1052.

Germany: RG. (July 6, 1910) 74 RGZ. 46.

Greece: App. Athenai (1933 No. 1085) 45 Themis 268; approved by FRAGISTAS, 10 Zausl.PR. (1936) 643.

Italy: Cass. Torino (April 17, 1903) 19 Revue Int. Dr. Marit. 478.

<sup>69</sup> Inst. Dr. Int. (Lausanne, 1888) 10 Annuaire (1889) 152; Congress of Antwerp (1885) *supra* n. 20, art. 8 sent. 2.

<sup>70</sup> Bulgaria: C. Marit. art. 189.

Portugal: C. Com. art. 674, No. 3.

Treaty of Montevideo, draft of 1940 on Navigation, art. 7. Recently SCERNI 308 resigns himself to this solution.

DIENA, 3 Dir. Com. Int. 432 called this view the only one based on solid legal principles.

wrong, the owner of the damaged vessel has the choice of suing under that law which is more favorable to him.<sup>71</sup>

This latter view may encounter the objection once raised by Fedozzi<sup>72</sup> that the delict has been committed not *on* but *by* a commercial vessel. Moreover, we have often been warned not to take too seriously the fiction that a vessel is a floating part of a territory.<sup>73</sup> However, looking for the least inappropriate local connection, American courts, with their traditional localization at the place of the injury, could well apply the law of the vessel which, or on board of which life or property, is injured. Occasionally, in fact, this view seems to have been floating through the mind of a court.<sup>74</sup>

(vi) The law of the forum is applied, either as representing a maritime custom of world-wide application,<sup>75</sup> or as a last resort in all cases,<sup>76</sup> or where one of the vessels

<sup>71</sup> RG. (Nov. 12, 1932) 138 RGZ. 243, 246; IPRspr. 1932 No. 60; 28 Revue Dor 45; Nouv. Revue 1935, 74; 1 Giur. Comp. DIP 177 (English steamer Henry Stanley). *Contra*: RAAPE, D. IPR. 329.

<sup>72</sup> Opinion, in the matter of the Lotus case, Revue de Droit International (Lapradelle 1928) 361; cf. SCERNI 306 n. 3.

<sup>73</sup> See the argument of CHESHIRE 309.

<sup>74</sup> 2 BEALE 1331 n. 4 mentions with hesitation *La Bourgogne* (1908) 210 U. S. 95, 138, and *The Saginaw* (1905) 139 Fed. 906.

<sup>75</sup> England: *The Leon* (1881) 6 P. D. 148. United States: *The Windrush* (D. C. S. D. N. Y. 1922) 286 Fed. 251, *aff'd* (C.C.A. 2d 1924) 5 F. (2d) 1425; but cf. HANCOCK 279, and against him, COOK, Book Review, 5 U. of Toronto L. J. (1943) 192.

<sup>76</sup> Belgium: Older practice, see CROUVÈS, 1 Répert. 73 No. 175 and Trib. com. Anvers (July 23, 1892) *id.* n. 2.

Denmark: S. Ct. (May 10, 1904) cited by CHRISTIANSEN, 6 Répert. 225 No. 89.

France: 1 Répert. 67 No. 144: the parties by bringing their suit to French jurisdiction, implicitly submit themselves to French law, including all provisions and prescriptions of the French Commercial Code! ASSER et RIVIER, *Éléments* § 113; VALÉRY § 978; ARMINJON, 2 *Précis* § 122.

Germany: Older practice: Oberapp. Ger. Lübeck (Jan. 30, 1849) 4 Seuff. Arch. No. 4 (The General Washington).

Prussia: Obertribunal (Oct. 25, 1859) 14 Seuff. Arch. No. 197 (The Columbus, British ship). RG. (Nov. 10, 1900) cited and restricted by RG. (Nov. 18, 1901) 49 RGZ. 182, 187 (case of "Kong Inge") and RG. (July 6, 1910) 74 RGZ. 46 (case of "Seine"). Return to *lex fori* has been advocated by REINBECK, "Schiffszusammenstösse auf hoher See etc.," Hans. RGZ. 1933 A, 337, 345.

belongs to the forum.<sup>77</sup>

### 3. Other Torts

English writers have discussed the case of two whale fishers of different nationality contending about the same whale.<sup>78</sup> The English case of an injury done to a submarine cable on the bottom of the high seas,<sup>79</sup> and the American case of the Titanic's collision with an iceberg<sup>80</sup> are other examples. Should an analogy be drawn from torts done on board only one vessel, or from collision? This is just a nice question for law students.

## V. SPECIAL PROBLEMS

### 1. Rules of Navigation

It is recognized in the United States that if the responsible persons of a vessel on the high seas observe the sailing regulations of the government shown by the flag, they are not to be blamed.<sup>81</sup> The case has become rare that regulations are different, but the doctrine should be adopted abroad. That local port and coast regulations ought to be complied with by all ships is settled beyond need of proof.

### 2. Extent of Damages

The old European customary rule that an innocent ship-owner may exclude his personal liability for maritime tort by surrendering (abandoning) the ship, or what is rescued

Greece: 2 STREIT-VALLINDAS 264 n. 23.

Italy: Codice della Navigazione (1942) art. 12.

U.S.S.R.: See *supra* n. 22.

<sup>77</sup> This result is reached by a few recent writers, such as FISCHER, *supra* n. 1, and SCERNI, *supra* n. 1, 307.

<sup>78</sup> *Supra* ns. 18, 19.

<sup>79</sup> Submarine Telegraph Co. v. Dickson (1864) 15 C. B. N. S. 759.

<sup>80</sup> (1914) 233 U.S. 718.

<sup>81</sup> See 2 BEALE § 408.1; 15 C.J.S. 17 § 3.

from it, to the injured party,<sup>82</sup> has not been transferred to the common law countries, but the United States, in the Act of 1851, introduced by statute a remedy conferring on the shipowner the election between abandonment and limited pecuniary damages.<sup>83</sup> Great Britain and some other countries have a different system of limiting the amount of damages to certain *maxima* computed upon the tonnage of the vessel.<sup>84</sup> Certain features of this system have recently been adopted in the United States.<sup>85</sup> The variants within the groups are considerable.

British courts, being bound by the Merchant Shipping Acts since 1862,<sup>86</sup> and those of the United States<sup>87</sup> apply the domestic method of reducing damages, irrespective of the place of tort and of the nationality of the ships. The usual British argument is the long since refuted classification of measures of damages as relating to the remedy rather than to the right. The United States Supreme Court, however, made it clear that at the bottom of the reasoning lies a plain consideration of public policy.<sup>88</sup>

Kuhn has wondered why resort should be had to American law to limit the liability of a foreign vessel for injuries to American citizens on the high seas.<sup>89</sup> Also a law review note<sup>90</sup> declared it "difficult to see why the principle of the

<sup>82</sup> The rule is still in use in France, Germany, Italy, Mexico, Portugal, Rumania, Spain, Egypt; cf. NEUHÄUSER, 6 Rechtsvergl. Handwörterbuch 193.

<sup>83</sup> Congressional Act of March 3, 1851, with amendments, Rev. Stat. §§ 4983-89, 46 U. S. C. A. §§ 183-189.

<sup>84</sup> Great Britain: Merchant Shipping Act, 1894/1932, s. 503. The Netherlands: C. Com. art. 541.

<sup>85</sup> Congressional Acts of August 29, 1935 and June 5, 1936, 46 U.S.C.A., Supp. 1944, § 183, 49 Stat. 960, 49 Stat. 1479.

<sup>86</sup> Merchant Shipping Act, 1894, s. 503.

<sup>87</sup> Restatement § 411; *Oceanic S. N. Co. v. Mellor (The Titanic)* (1914) 233 U.S. 718.

<sup>88</sup> Bradley, J., in *The Scotland* (1881) 105 U.S. 24 at 33; Holmes, J., in the case of *The Titanic* (1914) 233 U.S. 718 at 733.

<sup>89</sup> KUHN, Comp. Com. 308.

<sup>90</sup> 27 Mich. L. Rev. (1929) 206.

*lex loci* should be departed from merely because the case came up in admiralty" and recalled the former leading case, *Smith v. Condry*,<sup>91</sup> where the *lex loci* was applied rather than the *lex fori*. In fact, the majority of the Continental European courts without hesitation apply that law which in their view governs the tort claim as a whole.<sup>92</sup> As the French courts observe, one could not, in fact, juridically conceive that consequences of one sole act, the compensation of the same damage, be appreciated according to different laws and rules. The German Reichsgericht grants the owner of a ship damaged on the high seas the choice between the laws of both ships involved; he may recover the amount of damages determined by the law stating the higher maximum limit.<sup>93</sup>

Does it indicate a serious doubt that in a recent English case the High Court judge reserved for judicial decision the question whether the total loss of an Argentinian ship in a collision in the Paraná River should free the shipowner

<sup>91</sup> (1843) 1 How. 28, 11 L. Ed. 35.

<sup>92</sup> Belgium: Trib. com. Antwerp (June 26, 1890) 7 Revue Int. Dr. Marit. 582; App. Bruxelles (May 26, 1905) 21 Revue Int. Dr. Marit. 114 (both speaking in general terms).

France: Unanimous. The only question raised in this respect has been whether a foreign defendant may use the right to abandon the ship to his maritime creditors as according to the French law of the forum. In the approved opinion he may not, except when French law governs the collision. See Cass. (civ.) (Nov. 4, 1891) Clunet 1892, 153, 161ff.; cf. FISCHER, *supra* n. 1, 31-33.

Germany: 29 RGZ. 93; 37 RGZ. 182.

Italy. App. Genoa (Dec. 10, 1894) Clunet 1896, 907; Cass. Torino (April 17, 1903) Clunet 1906, 508; BOLAFFIO, 8 C. Com. (1923) 932; DIENA, 3 Dir. Com. Int. 354 n. 1.

The Netherlands: H.R. (June 24, 1927) W.11704, N.J. (1927) 129 (Swedish and German vessels colliding in Belgian territorial waters; Belgian law); Hof s'Gravenhage (Feb. 14, 1935) W. 12895 (Belgian shipowner, territorial Dutch waters); *id.* (Dec. 28, 1935) 35 Revue Dor. (1937) 359 (two Dutch vessels, Argentine waters).

Norway: CHRISTIANSEN, 6 Répert. 582 No. 185 (law of the flag).

The Scotch Court of Sessions in *Kendrick v. Burnett* (1897) 25 R. 82, 35 Scot. L. R. 62, adjusted the ordinary English double law rule in the absence of a *lex loci delicti* to the effect that the measure of damages has to be agreeable to the domiciliary laws of both parties.

<sup>93</sup> 138 RGZ. 242, 246.

according to Argentine law, or English law should apply?<sup>94</sup>

### 3. Public Policy

The requirements under which the action must agree with the domestic law, as in England and in a certain respect in Germany, have been applied to maritime torts.<sup>95</sup>

### 4. Formal Requirements of Suit

The position of a plaintiff is difficult, if the court where he finally is able to sue makes relief dependent on his having complied with the prescriptions of the law of the forum demanding protests or notices and limiting the time of bringing action. The Antwerp Congress gave him a broad option (*supra* p. 339), while the Brussels Convention simply abolished all formalities.

It is noteworthy that the Supreme Court of the United States has liberally declared a foreign vessel excused from observing the American formal provisions,<sup>96</sup> while various courts in other countries have clung to their local laws.<sup>97</sup>

<sup>94</sup> The Madrid [1937] P. 40, [1937] 1 All E.R. 216.

<sup>95</sup> See for England *supra* n. 57.

Germany: EG. BGB. art. 12; SCHAPS, Das Deutsche Seerecht (ed. 2) § 485, n. 29.

<sup>96</sup> The Scotland (1881) 105 U.S. 24, 33.

<sup>97</sup> France: *Lex fori* as to the time granted for bringing the suit: Cass. (civ.) (March 6, 1891) S. 1892.1.193, also published in 1 Répert. 67, Note (Curaçao waters); App. Rennes (Jan. 7, 1908) Revue 1908, 395 (Danish waters). *Contra*: in case of collision on the high seas, App. Aix (Dec. 23, 1857) D.1858.2.39; and in a broad survey, LYON-CAEN, Notes, S. 1893.1.193.

In Belgium the courts have been divided, see CROUVÈS, 1 Répert. 72 Nos. 167, 169; likewise in the Netherlands, see VAN HASSELT 366.

PART EIGHT  
CONTRACTS IN GENERAL

In this part, the following articles published in law reviews will be cited in abbreviated form:

Beale, "What Law Governs the Validity of a Contract," 23 Harv. L. Rev. (1910) 260.

Cook, Walter Wheeler, "An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws," 37 Ill. L. Rev. (1943) 418; also published under the title, "The Logical and Legal Bases of the Conflict of Laws, An Unpublished Chapter: In Conclusion," 21 Can. Bar. Rev. (1943) 249.

Lorenzen, "The Validity of Wills, Deeds and Contracts as Regards Form in The Conflict of Laws," 20 Yale L. J. (1911) 427.

—*id.*, "Validity and Effect of Contracts in the Conflict of Laws," 30 Yale L. J. (1921) 565, 655.

—*id.*, "The Statute of Frauds and the Conflict of Laws," 32 Yale L. J. (1923) 311.

—*id.*, "Uniformity between Latin America and the United States in the Rules of Private International Law relating to Commercial Contracts," 15 Tul. L. Rev. (1941) 165.

Nussbaum, "Conflict Theories of Contracts: Cases Versus Restatement," 51 Yale L. J. (1942) 893.



## Choice of Law by the Parties (Party Autonomy)

THE term, contracts, is taken hereafter in the narrow sense, restricted to agreements creating obligations, in which it is used at common law. This excludes agreements disposing of family or property relations. Also, conventions modifying or terminating existing obligations need separate treatment. Nor are unilateral declarations directly involved.

### I. THE PROBLEM OF AMERICAN LAW

The conflicts law concerning contracts is known as a source of difficulties, particularly in the United States. Commonly, the authorities are declared to be in great confusion and full of contradictions, and to be inconsistent in the same court.<sup>1</sup> The courts are said to choose without discernible coordination among at least four approaches, namely,

1. The law of the place where a contract is made (*lex loci contractus*),
2. The law of the place where the contract is to be performed (*lex loci solutionis*),
3. The law intended by the parties to be applied (party autonomy),
4. The law which upholds the validity of the contract.

The Appellate Division of New York declared in 1936

<sup>1</sup> See with particular regard to the validity of contracts, 2 BEALE 1077; GOODRICH § 107; STUMBERG 200-215; MCCLINTOCK, "Conflict of Laws as to Contracts, Minnesota Decisions," 10 Minn. L. Rev. (1926) 498, 499, 507; 11 Am. Jur. (1937) 397, Conflict of Laws, Contracts § 116; 17 C. J. S. (1939) Contracts § 12.

that, in determining which law governs the validity of a contract, the cases in that state variously regard as decisive: the place where the contract was made, the place of performance, the intention of the parties, or the grouping of the various elements which have gone to make up the contract.<sup>2</sup> The court in the case at bar employed all four methods, resulting in the same conclusion. Thus, not even that important state can be classified in one of the various alleged systems.

The leading authors have been in no greater harmony, except in stating the uncertainty. Recently, in interpreting the prevailing tendencies of the courts, four or more propositions have been set forth. Beale, who very vigorously preferred the law of the place of contracting for determining the validity of a contract, believed that his theory had become victorious.<sup>3</sup> Lorenzen has been a most influential supporter of an opposite opinion favorable to the law of the place of performance and the law tending to validate the contract.<sup>4</sup> In Batiffol's view, the great majority of cases actually apply the law of the place of performance whenever there is a point in so doing.<sup>5</sup> Nussbaum is the only writer to deny that there is confusion; he thinks that the decisions in reality exemplify a method of individualizing the facts and selecting the law most appropriate to the intention of the parties.<sup>6</sup> In the present writer's opinion, there is a strong old school tradition establishing as a basic or subsidiary rule, the law of the place of contracting; a second powerful theoretical current toward the law of the place of performance; and

<sup>2</sup> *Jones v. Metropolitan Life Ins. Co.* (1936) 158 Misc. 466, 286 N. Y. Supp. 4; *CHEATHAM*, Cases 478.

<sup>3</sup> *BEALE*, 23 *Harv. L. Rev.* (1909) 1, 8; 2 *BEALE* 1096, 1171.

<sup>4</sup> *LORENZEN*, 30 *Yale L. J.* (1921) 655, 673.

<sup>5</sup> *BATIFFOL* §§ 96, 97.

<sup>6</sup> *NUSSBAUM*, D. IPR. 223; *id.*, 51 *Yale L. J.* (1942) 892, 919; *id.*, Principles 177ff.

side by side, very many cases following mechanically one of these scholastic approaches, and very many others thoughtfully seeking a suitable law by some method or other. No single rule can be rested on the wealth of cases, but none is alien to all of them.

Again, if, according to certain methods used by Beale, the American jurisdictions were believed to be bound by conflicts rules prevailing traditionally in the courts of individual states, the picture of interstate affairs would be illustrated by this following example.

A merchant in Massachusetts (which is said to adhere to the rule of *lex loci contractus*), by intervention of a New York agent, enters into a transaction with a resident of California (where the *lex loci solutionis* is prescribed by statute), performance being due in Connecticut (a state clearly following the theory of intention of the parties). The requisites of a valid contract are established: in the Massachusetts courts by the law of New York; in the courts of California by the law of Connecticut; in the Connecticut courts according to the circumstances of the case; and how in New York, nobody knows.

Parties wanting to secure their transaction against the possible legal intricacies of the unknown governing law, would be made more helpless by the assertion popular in the literature that they cannot escape imperative rules of the governing law by agreeing on the applicable law.

May it be allowed, for present purposes, to abandon the fatalistic passivity with which either the condominium of the several rules has been taken as an existent and unavoidable evil or one of the rules has been perforce erected as the present law? What the desirable method should be, has been rather well defined in the last development of the world literature. Although none of the existing legislations in either hemisphere has reached the visible goal and scholarly

efforts are inchoate, we are able at least to visualize the way to be followed and the gigantic mass of prejudices that must be cleared away.

## II. THE THEORIES

It has earlier been submitted in this work<sup>7</sup> that conflicts law may allow the parties to a contract to select the applicable law. However, opinions are still divided into three main groups.

### 1. Theory Negating Choice of Law by the Parties

Reading the Restatement or certain Latin-American codes, one might feel that the parties are entirely unable to influence in any way the law governing their obligations. But the fact that for centuries most courts throughout the world have allowed the parties a very broad field of decision, has impelled the innumerable theoretical adversaries of "autonomy" to conceive a more moderate view.<sup>8</sup> In this view, every contract rests upon one predestined municipal law called to its function by the rule of conflicts without regard to the intention of the parties in the individual case. For instance, the law of the place where the parties make the contract, is imposed authoritatively on them. To the extent that this law permits the replacing of its own provisions by stipulations of

<sup>7</sup> Vol. 1, p. 83.

<sup>8</sup> The founder of this theory was BAR, see 2 BAR 4. In the United States: MINOR 401; BORCHARD, "Contractual Claims in International Law," 13 Col. L. Rev. (1913) 457; LORENZEN, 30 Yale L. J. (1921) 565, 655, 658; 31 *id.* (1922) 53; BEALE, 23 Harv. L. Rev. (1909) 260 and Treatise § 332.2; GOODRICH 278. Lists of continental writers have been given by CALEB, *Essai sur le principe de l'autonomie en droit international privé* (1927) who has revived this theory; NIBOYET, "La théorie de l'autonomie de la volonté," *Recueil* 1927, I, 5 (the most energetic advocate); see also lists by MELCHOIR 500 n. 1; GUTZWILLER 1606. On the adversaries of this theory, see Vol. 1 p. 85 n. 66. *Add* the able article by GERHARD MAYER, "Zur Parteiautonomie als Kollisionsnorm," 44 Z.int.R. (1931) 103; FEDOZZI-CERETI 690 § 2; KOSTERS in *Conférence de la Haye, Actes de la sixième session*, 351.

the parties, they may, instead of inventing new provisions, quote or cite or copy a section of a foreign statute. By such shorthand reference, they never do more than incorporate the foreign provision as a term of their agreement,<sup>9</sup> which remains controlled by the one invariably preordained law. German and Italian writers, among whom Zitelmann has grounded this doctrine on scientific considerations, distinguish this reference permitted by the governing municipal law, under the term of "contractual reception" or "*materiell-rechtliche Verweisung*"<sup>10</sup> (reference based on the substantive law), from the forbidden reference pertaining to conflicts law.

Although language in not a few English and American decisions alludes to the embodying of particular legal terms or rules in a contract, and such a provision may be said to be a mere stipulation rather than a reference to foreign law,<sup>11</sup> it would seem that a consistent distinction as in German writings is not made by common law lawyers, and correctly so.<sup>12</sup> Indeed, whatever the merits of this learned distinction may be when the question is whether a contract must be divided under two laws,<sup>13</sup> it is unsound to treat the reference

<sup>9</sup> COOK, Legal Bases 399, has used the same words to refute or tranquilize "the critics of the 'intention' theory," who oppose the proposition that foreign law *as such* should control as a consequence of the agreement. Yet, a little later Cook seems fully to accept the intention theory in its true meaning.

<sup>10</sup> The first term is used by PERASSI, *Rivista* 1928, 518. The second term seems to have been formed by ZIMMERMAN, 44 *Zentralblatt* (1926) at 883 and was popularized by HAUDEK, MELCHIOR, and M. WOLFF.

<sup>11</sup> See, for instance, DICEY (ed. 3) 61, General Principle No. VI, cancelled in ed. 5; Judge Learned Hand in *Louis-Dreyfus v. Paterson S. S.* (1930) 43 F. (2d) 824, 827; German Reichsgericht (Sept. 21, 1899) 44 RGZ. 300, 302; and see *infra* ns. 130-132.

<sup>12</sup> *Infra* at n. 134. It was different when the Lords in 1703, *Foubert v. Turst*, 1 Brown Parl. Cas. 38, 42, recognized the Custom of Paris of 1580, declared applicable in the contract, "as if the custom had been distinctly specified," which "by no means (involved) an attempt to introduce foreign laws." Foreign laws at that time were never applied in English courts. Cf. M. WOLFF, *Priv. Int. Law* 425.

<sup>13</sup> See this Chapter, *infra sub* III pp. 368 ff.

to a foreign legal rule in the same manner as when the parties refer to former arrangements or "to a work of Bentham" (as some writer has textually suggested). Reference to a foreign legal rule is necessarily always based on conflicts law.

The purpose of the described theory is to demonstrate that the parties are unable to transcend the margin of freedom left them in the particular primary legal system. Under this system, all stipulations except those which they may establish in the domestic field, they are forbidden to enter into also in the international realm. The so-called "imperative" provisions, *jus cogens*, of the predestined law are clamped down on all transactions—they *cannot* be evaded.<sup>14</sup>

*Illustration.* A citizen of New York entered in New York into an agreement with a German domiciled in Germany, without consideration as required by New York law. Under German law it was a valid contract. Could the parties decide that German law was to apply? Under § 332 (c) of the Restatement the answer is strictly no, the same as given by the majority of American, French, and Latin-American writers. The German Supreme Court had no objection to the agreement.<sup>15</sup> The Supreme Court of the United States declared a contract under similar circumstances (without agreement on the applicable law) valid under the Louisiana law of the place of performance.<sup>16</sup>

The problem is alike as respects capacity, formality, mutual consent, fraud and error, illegality, and any other vitiating factor. As a practical consequence, the allegedly inevitable primary legislation must be ascertained in every particular case, although this can be done authoritatively only by the court adjudging the case when the matter becomes litigious, a court unknown at the time of contracting and following

<sup>14</sup> BRÄNDL, "Der Parteiwille in der Rechtsprechung des Reichsgerichtes," Leipz.Z. 1925, 816, 821; BEER, 18 Z.int.R. 358.

<sup>15</sup> RG. (April 6, 1911) JW. 1911, 532, 24 Z.int.R. 305.

<sup>16</sup> Pritchard v. Norton (1882) 106 U. S. 124.

its own laws and lights. If we believe some of these writers, it is not even just one law from which all "imperative norms" are to be gathered, "but the law applicable varies according to the elements of the obligation and the transaction in question. It is precisely this variety and this multiplicity of effective laws that makes the matter of obligations in private international law so complex and so difficult."<sup>17</sup>

"Autonomy," however, endeavors to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course.

## 2. Proper Law Theory

Increasingly and with few interruptions, during four centuries from Rochus Curtius and Dumoulin to the rise of the learned opposition in our century and ever since, unruffled by all objections, courts have followed an all-inclusive doctrine of intention of the parties covering the entire field of obligatory contracts. The parties may *expressly* declare which law should govern their obligations; or they may *tacitly* choose this law; or the judge has to ascertain the law they may have *contemplated* in contracting. These three possibilities of *express*, *tacit*, and *presumed* or "*hypothetical*" intention are the only devices for localizing any contract, although the courts have developed certain criteria for construing unexpressed intentions.

The purest form of this doctrine appears in England<sup>18</sup> and is known as the doctrine of the proper law. As last formulated by Lord Atkin:

"The legal principles which are to guide an English Court on the question of the proper law are now well settled. It is

<sup>17</sup> 2 ARMINJON (ed. 2) 327 § 111.

<sup>18</sup> That Lord Mansfield's theory in *Robinson v. Bland* (1760) 2 Burr. 1077 is directly traceable to HUBER, has been emphasized by LLEWELYN DAVIES, "The Influence of Huber's *De Conflictu Legum* on English Private International Law," 18 Brit. Year Book Int. Law (1937) 49, 54, 62.

the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.”<sup>19</sup>

And Lord Wright, speaking for the Judicial Committee of the Privy Council, stated:

“It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances.”<sup>20</sup>

The peculiar character of this traditional approach should be well noted. The phases of choice of law according to the intention of the parties are three also in the modern opinion, but not identical with the above-mentioned traditional distinction. In the German view, for instance, the parties may have agreed on the applicable law; the judge may try to conform to the presumable will of the concrete parties; or the judge may seek a law conforming to the empirical intention of average parties. It is entirely characteristic of the genuine proper law theory that no such distinction is made. From the beginning of the English doctrine, when Lord Mansfield emphasized that the parties at bar had a view to the laws of England,<sup>21</sup> the courts assumed that the parties always contract with a certain law in mind, either “with an express view” to it, as in Lord Mansfield’s case, or tacitly.

<sup>19</sup> *Rex v. International Trustee for the Protection of Bondholders Aktien-gesellschaft* [1937] A. C. 500, 529. The most recent expression of the proper law theory, in *Duke of Marlborough v. Att. Gen.* (Dec. 11, 1944) C. A. [1945] 1 All E. R. 165, 171 refers back to Lord Watson’s dictum in *Hamlyn v. Talisker Distillery* [1894] A. C. 202, 212.

<sup>20</sup> *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277, 289.

<sup>21</sup> *Robinson v. Bland* (1760) 2 Burr. 1077, 1078; *cf.*, e.g., *Warrender v. Warrender* (1835) 2 Cl. & Fin. 488, 535: “The parties in a contract like this must be held emphatically to enter into it with a view to their own domicile and its laws.”



The court only discovers this view. The Swiss Federal Tribunal, which generally applies the law of the place of performance to the effects of all contracts, insists upon the statement that this is done, only because and to the extent that this law corresponds with the presumable intention of the parties in the particular case.<sup>22</sup> In the very large domain practically covered by this idea, no distinction is made among an agreement, an existent volition, and a merely supposed intention.

While eminent continental writers of the 19th century continued to accept the doctrine,<sup>23</sup> in more recent times the bulk of the literature went the other way. But quite recently, a few scholarly attempts have been made to support this all-inclusive intention theory of the courts,<sup>24</sup> in straight opposition to the anti-autonomy doctrine prevailing thus far. The most energetic theoretical foundation of the broadest conception of party autonomy has been undertaken by Batiffol.<sup>25</sup> In developing a suggestion by other writers,<sup>26</sup> he teaches that the parties never really select the law, not even when they expressly agree on choice of law. They merely *localize* the contract. The court, then, determines the law, following their

<sup>22</sup> BG. (May 9, 1923) 49 BGE. II 220, 225; BG. (Sept. 26, 1933) 59 BGE. II 355, 361. Cf. HOMBERGER, Obl. Verträge 43; NIEDERER, 59 Z. Schweiz. R. (N.F.) 239.

<sup>23</sup> E.g., 1 FOELIX § 94; 1 FIORE § 112; DESPAGNET § 294; ASSER-RIVIER, *Eléments* 71.

More recently, in Argentina, ALCORTA, 2 *Der. Int. Priv.* 240; ROMERO DEL PRADO, 2 *Manual* 321.

<sup>24</sup> MELCHIOR 501ff. for German law; NUSSBAUM, D. IPR. § 34, esp. at 221; NUSSBAUM, *Principles* 161.

<sup>25</sup> BATIFFOL § 17 and pp. 44ff.

<sup>26</sup> M. WOLFF, IPR. 86 par. 2, 88, and in "The Choice of Law by the Parties in International Contracts," 49 *Jurid. Rev.* (1937) 110, explains party autonomy by the assumption that the parties may constitute one of the existent local contacts of their contractual relationship as the decisive point of gravity. But it appears from his recent book, *Priv. Int. Law* 422ff., 435ff., that Wolff's own theory is not really much different from that proposed here.

Related theories, however, have been advanced by Italian authors, such as PERASSI, *Rivista* 1928, 516; BETTI, *id.* 1930, 15; BALDONI, *id.* 1932, 351; FEDOZZI-CERETI 697.

lead. The conflicts rule approves the law of the place where the contract has its center of gravity. The parties influence the latter by establishing locally connected obligations, or more directly, by selecting among several local contacts that one which in their own eyes is the closest or the most convenient. As they must know best about this center of gravity, the conflicts rule relies on their choice. Batiffol claims by this conception to conform to many modern needs and, at the same time, to rescue the traditional practice.

However, irrespective of results which must be reached under any approach, such a harmonization jars with the facts at both ends. An agreement of the parties to subject their contract to New York law, is itself a perfectly serious contract that cannot be degraded into a mere "localization" or disposal of the center of gravity. Why should this contract be a simple element for the finding by a court,<sup>27</sup> instead of a binding transaction legalized by the conflicts rule, as all recognized contracts are sanctioned by law? Again, in the unquestionably prevailing cases, the parties do not agree on the applicable law and have no law in mind, or else each party thinks of a different law. In all these cases, choice of law *cannot* be based, as it *must* be in the first case, on an actual will of the parties.

Moreover, were it true that choice of law is bound to follow the distribution of local connections, besides fatal consequences that have been inferred to these connections respecting the pretended territorial limits of party autonomy,<sup>28</sup> the contract would be necessarily split into segments, each governed by a local law, a proposition justly abhorred by the very authors mentioned.<sup>29</sup>

<sup>27</sup> BATIFFOL 156 § 176 and often; *cf.* the authors cited *infra* n. 30.

<sup>28</sup> See *infra* Chapter 29, p. 406 n. 56.

<sup>29</sup> BATIFFOL 69 § 77.

### 3. Theory Permitting Agreement of Parties on the Applicable Law

Despite some resistance by writers, there is practically no doubt that the parties to a contract have a right to determine by agreement the law applicable to their contractual relationship. Only the limits may be controversial.

Such agreement is a true contract,<sup>30</sup> having all requirements of a contractual engagement, but auxiliary to the main contract. A subtle controversy as to the law by which this accessory stipulation itself is governed,<sup>31</sup> offers more academic than practical interest. No case is known in which the law agreed upon would not be suitable for determining also the validity of the additional stipulation, provided that the forum has no specific objection.

An agreement may be declared expressly or by implication (tacitly, by conduct) as any other informal act. Implied agreement is closely related to, and often hardly distinguishable from, presumed intention, but in theory, at least, it is distinctly characterized. The parties are not presumed but positively assumed to have agreed on, not only thought of, the legal system to be applied. For instance, when an international loan debenture, written in English, follows the American legal terminology, appoints a bank in Manhattan as trustee in the American fashion, expresses the money amounts in dollars and makes the capital repayable in New

<sup>30</sup> HAUDEK 88ff.; RAAPE, D.IPR. 255. *Contra*: MELCHIOR 519 n. 3; BATIFOL 46 § 52; M. WOLFF, 49 *Jurid. Rev.* (1937) 130; RHEINSTEIN, Book Review, 37 *Col. L. Rev.* (1937) 330. These authors include implied intention and therefore think of "a coinciding view of the parties" rather than of a contract.

<sup>31</sup> See, for various views, WAHL, 3 *Zausl.PR.* (1929) 802; HAUDEK 91; MELCHIOR 520; RAAPE, D.IPR. 270; NIEDERER, 59 *Z. Schweiz R. (N. F.)* 249. Application of the law agreed upon to the problem of the conditions for consent to the agreement, as in the text above, has also been suggested by the special committee on conflict of laws concerning sales of goods (1931) art. 2 par. 3, 7 *Zausl.PR.* (1933) 957.

York—no one should doubt that the parties themselves have selected the law of New York, even though they omitted to say so in a clause.<sup>32</sup> Or, when it is stipulated in an American sales contract that it should be deemed to have been made at the domicile of the vendor,<sup>33</sup> this means as much as to refer directly to the law of that domicile.

Where only a "presumed" or "assumed" intention is ascertained, the applicable law is selected by the court rather than the parties. But that courts and enactments so often have treated all these categories on the same footing, may rest on practical wisdom. Tacit agreement of the parties, their probable ideas, and the efforts of a judge to find the law most appropriate to the contract made by them, are closely related and somewhat overlapping categories. To treat these groups by essentially divergent rules, increases the difficulties inherent in the matter.

### III. THE PRESENT SYSTEMS

#### I. Outside the United States

*Autonomy recognized.* Most codes recognize either in a complete formula "the law to which the parties expressly or tacitly intend to refer,"<sup>34</sup> or "the intention of the parties,"<sup>35</sup> or establish divergent provisions, only "if nothing else has been agreed upon."<sup>36</sup> In British common law since Lord

<sup>32</sup> RABEL, 10 Zausl.P.R. (1936) 492, 496.

<sup>33</sup> Case of Montreal Cotton & Wool Waste Co. v. Fidelity & Deposit Co. of Maryland (1927) 261 Mass. 385, 158 N. E. 795.

<sup>34</sup> French Morocco: Decree of Aug. 12, 1913, art. 13 par. 1.

Spanish Morocco: Dahir of 1914, art. 20 par. 1.

Montenegro: C. C. art. 792.

<sup>35</sup> Greece: C. C. (1940) art. 25. This was also the theory of the Supreme Court, decision No. 131, 1932, 43 Themis 449.

<sup>36</sup> Austria: Allg. BGB. §§ 36, 37 (but see pp. 369f.).

Belgian Congo: Decree of Feb. 20, 1891, art. 11 par. 2.

Brazil: C. C. art. 13 par. 1 (but see pp. 371f.).

China: Int. Priv. Law, art. 23 par. 1.

Italy: Disp. Prel. (1865) art. 9 par. 2; Disp. Prel. (1942) art. 25. But as to the former art. 58, C. Com., see Cass. (Jan. 21, 1928) Rivista 1928, 514.

Japan: Int. Priv. Law, art. 7.

Mansfield's famous dictum<sup>37</sup> and in the great majority of the other countries,<sup>38</sup> the courts firmly hold the same view, which also has been shared by the Mixed Arbitral Tribunals<sup>39</sup> and—so far as the cases required solution—by the Permanent Court of International Justice.<sup>40</sup>

*Austrian Civil Code.* Parallel to the broad reservations for the law of the forum which the Austrian Civil Code and its followers in Latin America have established with respect to the capacity of nationals,<sup>41</sup> they have restricted the principle of party autonomy in favor of the law of the forum. The Austrian Code provides:

Quebec: C. C. art. 8.

Portugal: C. Com. art. 4.

<sup>37</sup> England: Lord Mansfield's obiter dictum in *Robinson v. Bland* (1760) 2 Burr. 1077, 1 W. Bl. 234, cf. 2 BEALE 1093; formally declared *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321.

Australia: *McClelland v. Trustees Executors and Agency Co., Ltd.* (High Court of Australia 1936) 55 Commw. L. R. 483 at 493 opinion per Dixon, J.

<sup>38</sup> Belgium: POULLET § 297.

Bulgaria: See MAKAROV, 8 Zausl.PR. (1934) 660.

Egypt: SZÁSZY, *Droit international privé comparé* (1940) 559.

France: Cass. (civ.) (Dec. 5, 1910) S. 1911.1.129, Revue 1911, 395, Clunet 1912, 1156; Cass. (req.) (March 3, 1924) S. 1924.1.252; Cass. (civ.) (Jan. 27, 1931) S. 1933.1.41 (tacit agreement); Cass. (Nov. 2, 1937) Nouv. Revue 1937, 766. On the history of the cases see BATIFFOL § 32; see also NIBOYET 799.

Germany: "In an overwhelming number of decisions," see MELCHIOR 501 § 355, and for the cases from 1869 to 1892 see NIEMEYER, *Positives Intern. Privatrecht* 92 § 177.

Hungary: See SZÁSZY, 11 Zausl.PR. (1937) 168, 171.

The Netherlands: H. R. (June 13, 1924) W. 11281, N. J. (1924) 859; H. R. (April 8, 1927) W. 11664; App. Rotterdam (Jan. 3, 1935) N. J. (1935) 865, cited (with regret) by HIJMANS 175. The confusing view expressed by MULDER 164 that the decision of June 13, 1924 makes an end to the principle seems to be entirely unfounded.

Rumania: See JUVARA, *Actes de la 6ème Conférence de la Haye* 336; PLASTARA, 7 Répert. 75 No. 248.

Spain: See TRIÁS DE BES, "Conception de droit international privé etc.," *Recueil* 1930 I 657; 6 Répert. 257 No. 124.

Sweden: ALMÉN, 1 *Das Skandinavische Kaufrecht* (1922) 50.

<sup>39</sup> Mixed Arb. Tribunals: See for cases GUTZWILLER, 3 *Int. Jahrb. Schiedsgerichtswesen* (1931) 134ff.

<sup>40</sup> Judgments in the cases of the Brazilian and the Serbian Loans, Publications of the Permanent Court of International Justice, of July 12, 1929, Series A, Nos. 20 and 21, at 41, Clunet 1929, 977, 1002.

<sup>41</sup> See Vol. 1, pp. 117-119.

§ 36. If a foreigner in this country enters into a bilaterally obligatory transaction with a national, it shall be governed by this Code without exception; provided that he concludes it with a foreigner, the same applies only in case it is not proved that, in contracting, consideration was given to another law.

§ 37. If foreigners enter into transactions abroad with foreigners, or with subjects of this State, they are to be judged according to the laws of the place where the transaction was concluded; provided that in contracting another law has not evidently been taken as a basis. . . .

The Austrian courts also apply whatever they consider imperative rules of their law to any contracts made abroad in which an Austrian participates.<sup>42</sup> Apparently, the principle ordained in status matters that a contract by an Austrian national purporting to cause effects in Austria is governed by Austrian law (§ 4), is sometimes applied to other matters, too.<sup>43</sup>

*Latin America.* In general, it does not appear that party autonomy is entirely denied in Latin America, but according to numerous codes, in certain cases the law of the forum prevails. The Civil Code of Chile (1855) inaugurated this trend by the provision that:

The effects of contracts made abroad and to be performed in Chile are determined by the Chilean laws.<sup>44</sup>

Appearing as the third paragraph of a section dealing with "*bienes*," that is, probably meaning to indicate immovables,<sup>45</sup> situated in Chile, the provision would seem to refer exclusively to contracts concerning domestic real property, which class of transactions is expressly excepted from party au-

<sup>42</sup> WALKER 409 ns. 5 and 6; 1 EHRENZWEIG-KRAINZ § 27 n. 10.

<sup>43</sup> See 1 EHRENZWEIG-KRAINZ *ibid.*

<sup>44</sup> Chile: C. C. art. 16 par. 3, to which provision C. Com. art. 113 expressly refers.

<sup>45</sup> On the doubts existing with respect to movables, see CLARO SOLAR, 1 *Explicaciones de Derecho Civil Chileno* (1898) 125 § 215.

tonomy in the Brazilian Code.<sup>46</sup> Expressly under this narrower conception, the provision was adopted in the Codes of Colombia and Ecuador.<sup>47</sup> However, the Codes of Honduras, Panama, and El Salvador have reproduced the entire section without modification.<sup>48</sup> The Supreme Court of Chile<sup>49</sup> not only refers it to all objects but extends the law of the place of performance to the effects of all contracts. A Chilean place of performance would imperatively call for the Chilean law, while a contract to be performed abroad would be susceptible of an agreement in favor of a different law.

This double rule has been adopted in numerous other Latin-American laws, notably in Argentina, Brazil, and Mexico,<sup>50</sup> although only the Brazilian Civil Code of 1916 made it really clear that the parties may choose a law in general, but may not do so if the place of performance is in the country. The Argentine Code contains a maze of mysterious provisions.<sup>51</sup>

The Brazilian Code added the prohibition of an agreement of the parties as to "obligations entered into in a foreign

<sup>46</sup> Brazil: Introd. Law (1916) art. 13 § único, *sub* III ("transactions relating to immovables situated in Brazil"); *sub* IV ("transactions referring to the Brazilian mortgage system").

<sup>47</sup> Colombia: C. C. art. 20 par. 3.

Ecuador: C. C. art. 15 par. 3.

<sup>48</sup> Honduras: C. C. art. 14 par. 3.

Panama: C. C. art. 6 par. 3.

El Salvador: C. C. art. 16 par. 3.

<sup>49</sup> Chilean S. Ct. (June 8, 1911) *Hoffman v. Fisco*, 9 *Revista Der. Jur. y Ciencias Soc.* (1914) I, 358; (Jan. 5, 1933) *Artola V. de Achav. v. Compañía Huanchera de Bolivia*, 90 *id.* (1933) I, 373, 384 (shares of a Bolivian company possessed in Chile).

<sup>50</sup> Argentina: C. C. art. 1243 (1209).

Brazil: Introd. Law (1916) art. 13 § único, *sub* I ("contracts made abroad but to be performed in Brazil"); Introd. Law (1942) art. 9 § 1. On several controversial questions, see 2 *PONTES DE MIRANDA* 187, 191.

Mexico: C. C. (1928) art. 13; the former code (1884, art. 17) had expressly allowed transactions made by a foreigner abroad concerning movables to be submitted to another law.

<sup>51</sup> Argentina: Are art. 8 (8) and 1243 (1209) imperative? The answer is difficult because nobody knows which of the many sections involved includes the main principle. See the attempt to disentangle this complex by 3 *VICO* 122 § 137.

country by Brazilians,"<sup>52</sup> thus achieving four extensive reservations for the *lex fori*. The new Brazilian law, however, has replaced all restrictions to the agreement of the parties by one provision in favor of Brazilian formalities for contracts performable in the country. It would seem that thereby party autonomy is tacitly restored in all questions of substance. The comments, known thus far, proclaim this view, excepting, however, the "imperative" provisions of the law of the place of contracting.<sup>53</sup>

Another provision in favor of the domestic law was still more extraordinary. Peru and Guatemala seemed to allow a party agreement exclusively in favor of their own laws; but this may be obsolete.<sup>54</sup>

Authoritative writers have, often enough, manifested their dissatisfaction with the described nationalistic tendencies,<sup>55</sup> which, however, have never received, as a whole, the public rejection they deserve. To the contrary, the exorbitant theory that the state is entitled to dictate the *lex obligationis* to its subjects has been seriously maintained by a reputed writer.<sup>56</sup>

While certain codes omit any provision,<sup>57</sup> their silence may

<sup>52</sup> Brazil: C. C. art. 13 § único *sub* II.

<sup>53</sup> Brazil: Introd. Law (1942) art. 9; ESPINOLA, 2 Lei Introd. 568; SERPA LOPES, 2 Lei Introd. 316ff.; TENORIO, Lei Introd. 209-211 advocates restriction to the autonomy allowed by the *lex loci contractus*; *contra*: SERPA LOPES, *ibid*.

<sup>54</sup> Peru: C. C. (1852) art. 40 sent. 2, omitted in C. C. (1936) Tit. Prel., art. VII.

Guatemala: The provision of the Law on Foreigners, 1894, art. 16 sentence 2 has been reformed and appears in the Law on Foreigners, 1936, art. 24 sent. 3 restricted to external requisites in case the act or contract is to be performed in the country. However, MATOS 453 n. 1 § 327 does not stress or even mention this article.

<sup>55</sup> See, among others, recently, BEVILAQUA (1938) 368, although he seems (365ff.) to understand the Brazilian rules as mere presumptions; FULGENCIO, *Synthesis de Direito Internacional Privado* (1937) 145 § 299. *Contra*: 2 PONTES DE MIRANDA 191ff.

<sup>56</sup> PONTES DE MIRANDA, 39 *Recueil* (1932) I at 649.

<sup>57</sup> The Código Bustamante is enigmatic. BUSTAMANTE, *La comisión de juriconsultos de Rio* (Habana 1927) 119 § 141 declared that his draft recognized express and tacit intentions of the parties, but his added restrictions are based on the theory of a predestined national law or *lex loci contractus*.



appear ominous to the permissibility of agreements on the applicable law, in view of a recent discussion during the deliberation of the new text of Montevideo. The Argentine delegate, Vico, proposed that the intention of the parties be recognized with respect to the effects of contracts, where it is not in contradiction to prohibitions of the law of the place of performance; in other words, he followed the French theory rejecting true party autonomy. To the same effect, the present text of the Treaty was interpreted in the commission, in which, as is reported, the principle "of general and affirmative character triumphed that denies autonomy of intention any legitimacy for setting up a regulatory norm of private international law."<sup>58</sup> The Uruguayan delegate, Vargas Guillemette, proposed a round denial, and in fact, a clause was inserted into the Additional Protocol of the Conference declaring that "jurisdiction and law applicable according to the respective treaties, cannot be modified by the intention of the parties, except to the extent that this law authorizes them so to do."<sup>59</sup> It seems that all these formulations amount to the rule that the law of the place of performance or the other laws prescribed in particular cases by the treaty govern the freedom of the parties.

*Other jurisdictions rejecting party autonomy.* According to a very short report, the courts of Denmark and Norway do not recognize choice of law by the parties except within the domestic sphere of the competent law, which, however, does not seem defined with certainty.<sup>60</sup> The same is declared in a section of the Civil Code of the Soviet Union.<sup>61</sup>

<sup>58</sup> Instituto Buenos Aires, Segundo Congreso Sudamericano, at 285; República Argentina, Segundo Congreso Sudamericano, at 167.

<sup>59</sup> República Argentina, Segundo Congreso Sudamericano 211.

<sup>60</sup> Conférence de la Haye, Actes de la sixième session (1928) 276 (USSING, Denmark) and 337 (ALTEN, Norway); BORUM and MEYER, 6 Répert. 224 No. 80 (Denmark).

<sup>61</sup> The question is declared controversial, see STOUPNITSKI, 7 Répert. 114 No. 160; but see MAKAROV, Précis 300ff.

## 2. United States

Until recently, the opinion dominant among the European scholars was fully shared by the leading American writers.<sup>62</sup> The most radical form of this doctrine, denying not only desirability but existence to a choice of law by the parties, has been adopted by Beale and is evident in the perfect silence of the Restatement on everything connected with party autonomy.

A few, very few, cases, reflecting this principle denying party autonomy, are best represented by Judge Learned Hand's formulation:

"People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."<sup>63</sup>

Textbooks and encyclopedias, however, readily admit that regard to the intention of the parties is one of the approaches which an American court may use.<sup>64</sup> Beale himself recorded in 1910 as in 1934 that it appeared in the second most numerous group of cases.<sup>65</sup> The Supreme Court of the United States has most frequently followed this theory,<sup>66</sup> starting

<sup>62</sup> In addition to BEALE: LORENZEN, 30 Yale L. J. (1921) 655 and *passim*; GOODRICH 278; previously FOOTE 397; MINOR 401. See COOK, Legal Bases 389.

<sup>63</sup> Gerli & Co., Inc. v. Cunard S. S. Co., Ltd. (C.C.A. 2d 1931) 48 F. (2d) 115, 117; accord, Commissioner of Internal Revenue v. Hyde (C.C.A. 2d 1936) 82 F. (2d) 174. In both cases the decision was not dependent on the dictum.

<sup>64</sup> STUMBERG 200, 209.

<sup>65</sup> BEALE, 23 Harv. L. Rev. (1910) 260; 2 BEALE 1172 still mentions 13 states, as against 21 states allegedly following the *lex loci contractus*, but see *infra* Chapter 30, p. 451.

<sup>66</sup> See STUMBERG 209 n. 42; LORENZEN, 30 Yale L. J. (1921) at 579; NUSSBAUM, 51 Yale L. J. (1942) at 919.

from a dictum by Chief Justice Marshall in 1825,<sup>67</sup> and has purposefully remarked that this is the general rule "concisely and exactly stated before the Declaration of Independence by Lord Mansfield."<sup>68</sup> It has been said that:

"The situs of contracts is one of the troublesome problems of private international law, but one rule stands forth clearly: That the intention of the parties as to the law they desired to apply will govern, if such selection be made in good faith, and be not opposed to the public policy of the forum."<sup>69</sup>

The courts of New York have clearly followed the same view. In 1935, the New York court of last resort has explicitly restated the principle:

"The intention of the parties, express or implied, generally determines the law that governs a contract."<sup>70</sup>

However, the courts, compelled to find their way against the hostility of the leading scholars, have been increasingly prone to indecision and inconsistency. The doubts whether parties may determine their law at all, may have been augmented by Beale's influence, although they do not seem to have taken strong roots. Also, the unreasonable belief that parties can choose only between the law of the place of contracting and that of the place of performance, seems to have increased as an effect of Beale's teaching.<sup>71</sup> The confusion of the cases, so often deplored, would have been relieved in part, if the courts had always been told in no uncertain words that it is not at all in their discretion and free decision to

<sup>67</sup> *Wayman v. Southard* (U. S. 1825) 10 Wheat. 1, cited in *Pritchard v. Norton* (1882) 106 U. S. 124 as a precedent, cf. KUHN, *Comp. Com.* 280.

<sup>68</sup> Mr. Justice Gray in *Liverpool and Great Western Steam Co. v. Phenix Ins. Co.* (1888) 129 U. S. 397, 447.

<sup>69</sup> *O'Toole v. Meyenburg* (C.C.A. 8th 1918) 251 Fed. 191, 194.

<sup>70</sup> *Compañía de Inversiones Internacionales v. Industrial Mortgage Bank of Finland* (1935) 269 N. Y. 22, 26, 198 N. E. 617.

<sup>71</sup> According to LEE, "Conflict of Laws relating to Installment Sales," 41 Mich. L. Rev. (1942) 445, 468, most courts share in this belief. This may be doubted, however.

apply a law which the parties agreed to apply. The most recent writers have claimed the theory of intention to be existent in all American courts.<sup>72</sup> It should be so in any case, and this would give, as Cook has said, as much security as the rules of the Restatement.<sup>73</sup>

### 3. Express Agreements

Stipulations concerning the law applicable to a contract are not so rare as some writers believe. Of course, compared to the constant flow of millions of interstate and international transactions, a small percentage are provided with appropriate clauses. But world commerce, advised by trade organizations and counsel, has been using such stipulations in ever increasing types of contracts. It is true, the trend is much less strong in the United States, a fact obviously connected with the prevalence of interstate commerce based on federal statutes and a critical attitude of courts. The British standard forms with their reference to English law and London arbitration have aroused countermeasures in the United States as well as in Central Europe. Also, it happens that the arbitration clauses in their large progress are powerful competitors, since they tend toward decisions discarding legal considerations. Arbitrators of the type of "*amiable compositeurs*" or "*de facto* arbitrators," have no duty to observe rules of law, and where there is such duty, frequently no sanction is stated. The situation is different in England, some British dominions, and some American states, where the courts retain a considerable function, and to some extent in other countries in which arbitrators are presumed to apply the local state law.<sup>74</sup>

<sup>72</sup> See (in various limitations) COOK, Legal Bases 418; BATIFFOL 31 §§ 36-38; *id.* 58 §§ 63-68; NUSSBAUM, 51 Yale L. J. (1942) 919. Cf. *infra* Chapter 29 p. 403 n. 46.

<sup>73</sup> COOK, 21 Can. Bar Rev. (1943) 249, 253 No. 8.

<sup>74</sup> For all details, see the instructive article by E. COHN, "Commercial Arbitration and the Rules of Law, A Comparative Study," 4 U. of Toronto L. J. (1941) 1.

But growing opposition to the arbitrariness of lawless arbitration on legally material questions ought to bring express stipulations on the applicable law to renewed significance.

Traders of bulk merchandise have used for many decades standard forms influenced by British habits and institutions. Thus, in the grain trade from America to Europe, the La Plata Grain Contract of the London Corn Trade Association subjects the parties to London arbitration and English law. A frequent clause providing in lengthy caution for the determination of arbitration suits, begins with the following words:

"Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the Courts of England or Arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the Arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England whatever the domicile, residence, or place of business of the parties to this contract may be or become. . . ." <sup>75</sup>

In another, apparently now prevailing, form, only arbitration is stipulated:

"All disputes from time to time arising out of this contract shall be referred to two Arbitrators . . . or to an Umpire. . . ."

"All Arbitrators shall be governed by the provision of the Arbitration Act for the time being in force in England, except so far as the same may be modified by or be inconsistent with the foregoing provisions."

"The Arbitrators or Umpire appointed shall, in all cases, reside in the United Kingdom, and at the time of their ap-

<sup>75</sup> See for a list of German, French and Italian cases dealing with this form, HAUDEK 102 n. 1.

pointment shall be themselves members of the London Corn Trade Association Ltd. . . .”<sup>76</sup>

In a comparable way, brokers of any place will in certain contracts with customers refer to the rules of the exchange and the law of the state where the order is to be executed. For instance:

“All orders executed in New York or any New York Stock Exchange or Curb Exchange shall be executed in accordance with the laws of New York and the rules and regulations of the said exchanges prohibiting fictitious and illegal transactions, contracts and agreements, and it is understood and agreed that the validity of all transactions . . . executed on any New York Stock Exchange or New York Curb Exchange shall be controlled and determined solely by the laws of New York.”<sup>77</sup>

References to English law are to be found also in the contract forms of the London Rubber Trade Association, Incorporated Oil Seed Association, London Rice Brokers Association, London Copra Association, London Cattle Food Trade Association, Liverpool Cotton Association, and references to German law in the general conditions of such organizations as those of the German carriers<sup>78</sup> and maritime insurers.<sup>79</sup> Moreover, particular banks, underwriters, maritime carriers, and certain large merchants have stipulated for their own law by stereotyped clauses in Germany,<sup>80</sup> and

<sup>76</sup> La Plata Grain Contract, form No. 41. *Parcels for Continent. Rye Terms*. (March 1938) clause 11 (excerpt). In the so-called North American contracts, certificates of inspection being declared final as to quality, the disputes subject to arbitration are such as might arise from other causes than quality of the shipment. See Department of Commerce, Bureau of Foreign and Domestic Commerce, General Legal Bulletin of March 28, 1936, 7.

<sup>77</sup> Used by a Boston broker and declared valid in *Weisberg v. Hunt* (1921) 239 Mass. 190, 198, 131 N. E. 471, 474. See also *Cisler v. Ray* (1931) 82 Cal. Dec. 396, 2 Pac. (2d) 987, annotated in 20 Cal. L. Rev. (1932) 97: subjection “to the rules, regulations and customs of the exchange or market (and its clearing house, if any) where executed.”

<sup>78</sup> See, e.g., *Duncan, Fox & Co. v. Schrempf & Bonke* [1915] 1 K. B. 365.

<sup>79</sup> HAUDEK 102.

<sup>80</sup> HAUDEK 101. Example: “Place of performance for both delivery and pay-

probably in many countries.<sup>81</sup> Passenger tickets of British ships,<sup>82</sup> bills of lading regarding vessels leaving English, Dutch, and Belgian ports for America have been traditionally referred to "the common law of England, to wit, general maritime law," or to British law.<sup>83</sup> More recently, it seems more usual to declare that the contract shall be governed by the law of the flag of the ship carrying the goods.

In maritime insurance policies, reference has often been made to the English Insurance Act of 1906 and the conditions and usages of English Lloyd policies. A clause in a contract between two Dutch companies "as if the policy were signed in London," has been treated as an express reference to English law by the Appeal Court of the Hague.<sup>84</sup>

Aircraft transport consignments regularly provide for the national law of the carrier,<sup>85</sup> insofar as international conventions do not yet regulate liabilities. International loans have often contained<sup>86</sup> but sometimes omitted a clause ascertaining the applicable law, and drafters will probably be

ment, as well as jurisdiction for both parties, is in Kiel. The contractual relations are governed by German law." (Friedrich Krupp Germaniawerft Aktiengesellschaft, Kiel-Gaarden, conditions of delivery to foreign countries, published in MÜLLEREISERT, *Allgemeine Lieferungsbedingungen* (1932) 109).

<sup>81</sup> Belgium: Société Coloniale Anversoise, contracts, see HELLAUER, *Kaufverträge in Warenhandel und Industrie* (1927) 189.

Japan: Ferncliff (1938) *Am. Marit. Cas.* 206, 219: bill of lading to be construed in accordance with the law of Japan.

<sup>82</sup> E.g., in *Oceanic Steam Navigation Co. v. Corcoran* (1925) 9 F. (2d) 724.

<sup>83</sup> E.g., in the Canadian cases: *Mathys v. Manchester Liners* (1904) 25 Que. S. C. 426: "All disputes regarding the bill of lading to be settled according to common English law"; *Can. Sugar Refining Co. v. Furness Withy & Co.* (1905) 27 Que. S. C. 502: "the contract shall be governed by the common law of England, to wit, the maritime law of England"; *Vipond v. Furness* (S. C. of Canada 1916) 35 D. L. R. (1917) 278: "Any claim or dispute arising on this bill of lading shall, in the option of the ship owner, be settled with the agents of the Line in London according to British law, with reference to which this contract is made to the exclusion of proceedings in any other country." Similarly, *Hart & Son v. Furness, Withy and Co.* (1904) 37 N. S. R. 74.

<sup>84</sup> Hof s'Gravenhage (May 17, 1923) W.11171. On the decision of the Supreme Court in this cause, see *infra* n. 128.

<sup>85</sup> FERNAND DE VISSCHER, in 48 *Recueil* (1934) II 325.

<sup>86</sup> See for list of judicial cases, HAUDEK 105 n. 1.

experienced enough, by now, not to forget one. The same is true for agreements between banks.<sup>87</sup> In many American contracts of finance corporations, insurance policies, and other agreements,<sup>88</sup> the place of the main office of the company is indicated as the place where the contract is made, frequently with the express addition that the law of this place shall govern. This is a tribute paid to the historical role of the *lex loci contractus*. Again, to comply with the idea that the place of performance governs the contract, in German form blanks or general conditions, producers and sellers almost invariably state that "place of performance and exclusive jurisdiction" are to be at their own domicile.<sup>89</sup> This clause is regularly regarded, as if the law of this place were expressly stipulated.<sup>90</sup> Although foreign exclusive jurisdiction is not easily conceded by American and many other courts in suits of residents against nonresidents, agreement on a

<sup>87</sup> See for an example, *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag* (1943) [1944] Ch. D. 13.

<sup>88</sup> E.g., oil lease, *WILLISTON*, 7 Contracts 5791; *Montreal Cotton & Wool Waste Co. v. Fidelity & Deposit Co. of Maryland* (1927) 261 Mass. 385 (sale of goods). Conditional sales contract, *Rubin v. Gallagher* (1940) 294 Mich. 124, 292 N. W. 584 (the court recognizes a subjective right created by the clauses); *Stern v. Drew* (App. D. C. 1922) 285 F. 925; *Craig & Co., Ltd. v. Uncas Paper Board Co.* (1926) 104 Conn. 559, 133 Atl. 673, in which cases the clause has been discarded by the court and by *LEE*, *supra* n. 71, at 471.

<sup>89</sup> "Smaller enterprises and firms with widespread patronage usually provide at least for exclusive jurisdiction to be at the place of their management; in the industry and big trade it is very common to exclude in the general conditions state jurisdiction in favor of private arbitration." *RAISER*, *Das Recht der allgemeinen Geschäftsbedingungen* (1935) 41. The Industry and Commerce Chamber in Berlin, however, advised not to use any clauses modifying the legal provisions on the place of performance and jurisdiction, see *RÜHL*, *Juristischer Anschauungsstoff*, Heft 1 (1931) 20.

The custom is widespread. For instance, in a contract between an American and a Danish firm, the stipulation that the place of performance and of jurisdiction should be in London, was recognized by the Admiralty and Commercial Tribunal in Copenhagen (Dec. 20, 1938) *Ugeskrift for Retsvaesen* 1939, 238, 41 Bull. Inst. Int. (1939) 52 No. 10762.

<sup>90</sup> Usage of merchants and practice of the courts are comprehensively treated in *LEONHARD*, *Erfüllungsort und Schuldort*, 166ff.; *id.* 183ff. Of course, the clause may intend only advantages of private and procedural law, *STAUB-HEINICHEN* in 3 *Staub* 547, Anhang zu § 372 n. 6a.



law in the form of determining the place of making or performance should be respected on principle. Certainly, it should also be out of question to invalidate the American clause determining the place of contracting as fictitious, as eminent judges have occasionally done.<sup>91</sup> An English court had no difficulty in enforcing the following clause in a contract made in New York between a citizen of Ecuador, who never had an English domicil, and a Canadian company, respecting certain mineral rights in Ecuador:

"While for convenience this agreement is signed by the parties in the City of New York, United States, it shall be considered and held to be one duly made and executed in London, England."<sup>92</sup>

American life insurance companies doing business in Europe have been compelled to settle for the jurisdiction and law of the country of their branch.<sup>93</sup>

In ordinary American business agreements extending over several states, stipulations determining the applicable law are by far not so frequent as they should be. But remarkable

<sup>91</sup> Especially Mr. Justice Brandeis, dissenting in *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357.

Similarly, the Supreme Court of Italy, Cass. (July 26, 1929) *Rivista* 1931, 406.

To the contrary effect, e.g., *England: British Controlled Oilfields v. Stagg* (1921) 66 Sol. J. 18.

France: Cass. (req.) (Aug. 6, 1867) D. 1868.I.35, S. 1867.I.400 and constantly, see *BATIFOL* 43 n. 1.

<sup>92</sup> *British Controlled Oilfields v. Stagg* (1921) 66 Sol. J. 18.

<sup>93</sup> Thus Czarist Russia prescribed submitting of insurance policies issued in Russia to Russian law. After the intervention of the Soviet decrees affecting the insurance contracts, two conflicting decisions of the New York Court of Appeals resulted, namely, *Slisberg v. New York Life Ins. Co.* (1927) 244 N. Y. 482, 155 N. E. 749, and *Dougherty v. Equitable Life Assurance Society* (1934) 266 N. Y. 71, 193 N. E. 897. In the first case the court disregarded, in the second case the majority of the court, against the vote of Judge Lehman, respected, the stipulation of submission to the Russian law required by the Russian statute, cf. Note, 88 U. of Pa. L. Rev. (1940) at 986. However, the problem of the cases was the situs of the obligation rather than the applicable law; cf. *RABEL*, "Situs Problems in Enemy Property Measures," 11 *Law and Cont. Probl.* (1945) 118, 131.

negative references occur, a kind of *clausulae salvatoriae*, to save as much of the contract as the various statutes possibly involved may allow. Thus, in combination with a general reference to the law of Michigan, contracts of the Detroit automobile industry, with its many thousands of dealers in the world, state that any provisions contravening the laws of any country, state, or jurisdiction shall be deemed not a part of the agreement. In conditional sales contracts, clauses are to be found such as follow:

"If the law of Tennessee [where the contract is made] does not apply to and govern the contract between the parties, their rights and remedies, then the laws of Ohio or Arkansas apply."

"It is the express intention of the parties hereto that this agreement and all the terms hereof shall be in conformity with the laws of any state wherein this agreement may be sought to be enforced, and if it should appear that any of the terms hereof are in conflict with any rule of law or statutory provision of any such state, then the terms hereof which may conflict therewith shall be deemed inoperative and null and void in so far as they may be in conflict therewith, and shall be deemed modified to conform to such rule of law."<sup>94</sup>

By an analogous method, an automobile policy provides that:

"Any and all provisions of this policy which are in conflict with the statutes of the state wherein this policy is issued are understood, declared, and acknowledged by this company to be amended to conform to such statutes."<sup>95</sup>

<sup>94</sup> *Stevenson v. Lima Locomotive Works* (1943) 180 Tenn. 137, 172 S. W. (2d) 812, recognizing these clauses and apparently inferring the intention of the parties that the state of enforcement should furnish the applicable law; the decision is understood to this effect also in the Note, 148 A. L. R. (1944) 375, 376.

See also HOAR, *Conditional Sales* (1937) App. B, Forms, p. 438.

<sup>95</sup> Form used by Central Mutual Ins. Co. of Chicago and procured for me by the kindness of Att. Edgar H. Ailes, Jr., Detroit. The stipulation continues to the effect that nevertheless the liability of the company should not be increased but the assured should reimburse the company for any loss, costs, or expenses

and that:

"Any stipulation therein in conflict with or contrary to the laws of the state or province (of Canada) where the liability arises shall be considered as not written, and the law of such forum shall apply."

and moreover:

"If any condition of this policy relating to the limitation of time for notice of accident or for any legal proceeding is at variance with any specific statutory provision in the State in which the accident occurs, such specific statutory provision shall be substituted for such condition."<sup>96</sup>

A company appointing a branch manager usually inserts in the employment contract a clause restraining him from engaging in the particular trade during a certain period after the termination of the contract. Such clause may expressly refer for construction to the law of the place of performance, meaning the state in which the branch is situated,<sup>97</sup> because the legality of the clause would presumably be judged by the courts according to this law.

The most notable similar clause in the international field was introduced to safeguard maritime affreightment contracts against the danger of contravening the American Harter Act.<sup>98</sup> At present an analogous so-called "clause paramount" is ordered by many enactments in connection with the Hague Rules to be inserted in bills of lading<sup>99</sup> and in addition often voluntarily adopted. The clause states that the contract of transportation shall be subject to the Convention of Brussels of 1924 that sanctioned the Hague Rules, or to a sea carriage

exceeding the scope of the policy. A similar clause is concerned with the exigencies of the Motor Vehicle Financial Responsibility Law of the state or province in which the policy is (eventually deemed to be) issued.

<sup>96</sup> *Duncan v. Ashwander* (D. C. D. La. 1936) 16 F. Supp. 829, 832.

<sup>97</sup> Form drafted by Mr. Thomas G. Long in Detroit.

<sup>98</sup> See *infra* Chapter 29, p. 424 n. 135.

<sup>99</sup> Thus in the United States: Carriage of Goods by Sea Act, of April 16, 1936, c. 229 § 13, 49 Stat. 1212, 46 U. S. C. A. § 1312.

of goods act embodying these Rules, and that any contrary stipulation shall be null and void. The clause is "paramount" to all other stipulations.<sup>100</sup>

During war times, the United States Government in contracts with firms undertaking comprehensive works, often assumed its direct liability for the obligations undertaken by the contractor to a subcontractor in a subcontract made by him; to secure the subcontractor independent rights as a beneficiary in all courts, this agreement is declared to be governed by the laws of the District of Columbia.<sup>101</sup>

On principle, despite Beale, there cannot be the slightest doubt that all the mentioned agreements are held valid in all countries, including the United States, with the possible exception of a few Latin-American jurisdictions. The courts recognize reference to sister states as well as to foreign countries.<sup>102</sup> Only the limits have to be discussed.

#### 4. Implied Agreements

Parties agree tacitly to the application of a particular law when their behavior shows their obligations to be intentionally connected with the private law of a certain country. If they have only a law "in mind" but do not express their intention at least by conduct, there is no case for a tacit stipulation. But, for instance, parties having in their former transactions agreed on the application of a certain law, may well be supposed to intend a similar submission in making a new contract.

<sup>100</sup> For the interesting particulars, see the informative article in 40 *Revue Dor* (1939) 169.

<sup>101</sup> For this information, too, I am indebted to Mr. Thomas G. Long. The situation existing without such a clause has been described by GRASKE, *War Contract Claims* (WILLISTON, 9 *Contracts*, 1945) § 172.

<sup>102</sup> For instance, Italian law: *Mittenthal v. Mascagni* (1903) 183 *Mass.* 19, 66 *N. E.* 425.

Canada: *M. A. Kennedy v. Fiat of Turin* (1923) 24 *O. W. N.* 537: "all controversies shall be referred to the Turin Law Court to be dealt with according to Italian law."

In addition to the cases of international loans and sales, another typical example free from doubt is a transaction at a stock or commodity exchange. Every participant knowingly submits himself to the regulations and usages of the exchange as well as to the state law in force at the place. Even an order to a broker in Zürich, to be performed at the local exchange, has been considered an intentional subjection to the usages of Zürich and to Swiss law.<sup>103</sup>

Assuredly, the border line between tacit and presumed intention is often dubious. Where the parties by agreement submit to the jurisdiction of a certain country, some decisions have taken for granted that the agreement extended to the municipal law of that country.<sup>104</sup> The English House of Lords declared this inference so sure that no one could doubt.<sup>105</sup> Others, more cautiously, only infer a presumable intention to submit to this law.<sup>106</sup> But it seems settled that the court or board of arbitration to which the parties have submitted, would apply, if not its own municipal law, certainly its own conflicts rules.<sup>107</sup>

In the English courts, also a clause of submission to English arbitrators is regularly deemed to imply reference to English law.<sup>108</sup> Analogous inferences, although with more

<sup>103</sup> Switzerland: BG. (Oct. 21, 1942) 68 BGE. II 220; but this is a controversial matter.

<sup>104</sup> Germany: RG. (Feb. 22, 1881) 4 RGZ. 242 and in constant practice; see also IPRspr. 1926-27 No. 3; 1931, 63, 78; 1933, 19, 40; Bay.OBLG. (May 16, 1934) IPRspr. 1934, 44.

<sup>105</sup> England: *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., Ltd.* [1927] A. C. 604, 608, 609 (H.L.) per Lord Dunedin and Lord Phillimore.

<sup>106</sup> Canada: See 3 JOHNSON 449.

Switzerland: BG. (Sept. 18, 1934) 60 BGE. II at 302 and precedents cited; cf. (June 9, 1936) 62 BGE. II 125.

<sup>107</sup> See arbitration, Hamburg, Hans. RGZ. (1931) B 419, 421.

<sup>108</sup> *Hamlyn v. Talisker Distillery* [1894] A. C. 202; *Spurrier v. La Cloche* [1902] A. C. 446 (P. C.); *Sanderson & Son v. Armour & Co.* (1922) 91 L. J. (P. C.) 167 (H.L.); *N. V. Kwik Hoo Tong Handel Maatschappij v. Finlay & Co.* [1927] A. C. 604 (H.L.); *Vita Food Products v. Unus Shipping Co.* [1939] A. C. 277.

dependence on the circumstances, occur elsewhere.<sup>109</sup> Arbitration, however, in this country<sup>110</sup> and in many others, at present very often entails decisions without reference to any particular private law. But such a clause has been said to influence conflicts law by excluding the ordinarily applicable law.<sup>111</sup>

Much discussion has been devoted in Switzerland to the case where both parties in court plead application of a certain law to the litigious contract. Can the parties agree on choice of law even as late as in court? Party autonomy can hardly be pushed so far, except where there is a clear-cut new contract modifying their relation.<sup>112</sup> However, the Swiss Federal Tribunal previously was inclined to consider statements of counsel on the applicable law as a conclusive argument for a tacit agreement in contracting.<sup>113</sup> At present, the Swiss and German highest courts regard such statements only as one among other clues for assuming a hypothetical intention.<sup>114</sup> That the Mixed Arbitral Tribunals were only too glad to encounter consonant declarations of the parties per-

<sup>109</sup> Germany: RG. (June 19, 1906) JW. 1906, 452; (July 8, 1913) Hans. GZ. 1913, 282 and others.

France: See conclusions by BATIFFOL § 152.

Switzerland: BG. (May 18, 1917) 43 BGE. II 228; Cass. Zürich (April 8, 1924) Bl.f.Zürch.Rspr. 248, 2 Int. Jahrb. Schiedsgerichtswesen (1928) 352.

*Contra*: Germany: RG. (Oct. 14, 1913) Warn.Rspr. 1914, 42; (Nov. 19, 1929) JW. 1930, 1862; (June 10, 1933) IPRspr. 1933, 44.

*Contra*: The Netherlands: Hof s'Gravenhage (Feb. 10, 1911) W.9161; Rb. Amsterdam (March 3, 1911) W.9208.

The great majority of governments, in their answers concerning the sales of goods (Sixième Conférence de la Haye, Documents 460), denied that even in the intention of the parties the designation of arbiters was in strict connection with the application of the national law of the arbiters.

<sup>110</sup> WILLISTON, 6 Contracts § 1924; ISAACS, "Two Views of Commercial Arbitration," 40 Harv. L. Rev. (1927) 929, 937.

<sup>111</sup> The Netherlands: Rb. Rotterdam (May 3, 1934) N. J. (1935) 958.

<sup>112</sup> *Cf.* BG. (June 9, 1936) 62 BGE. II 125, denying any force even to a novatory agreement, if not foreseen in the contract; German OLG. Hamburg (Oct. 21, 1901) 11 Z.int.R. 443 regarded the party disposition binding on the court.

<sup>113</sup> See 43 BGE. II 228 and for the history of the practice, FRITZSCHE, 44 Z.Schweiz.R. (N.F.) 232a; NIEDERER, 59 Z.Schweiz.R. (N.F.) 249-252.

<sup>114</sup> 49 BGE. II 225; 62 *id.* II 125; 63 *id.* II 307; RG. (April 4, 1928) IPRspr. 1929 No. 31; RG. (April 27, 1932) 86 Seuff. Arch. 299, IPRspr. 1932 No. 32; RG. (June 10, 1933) 151 RGZ. 193, 199.

mitting them to avoid entanglement with two or more conflicts laws,<sup>115</sup> is well understandable. It seems that most courts believe themselves to be entitled to accept the pleading of both parties based on the law of the forum, without further investigation. This may be legitimate when it conforms to the procedural rules, which is not self-evident. Foreign law is not really a mere fact.

In conclusion, agreements on the applicable law, made otherwise than by words, are not very frequent, but should by no means be overlooked in the search for the applicable law.

## 5. Scope of the Agreement

(a) *Problem of renvoi*. All writers seem to agree that parties stipulating for an applicable law intend to apply the municipal law without renvoi.<sup>116</sup>

(b) *Nullity by choice of law*. Some adversaries of party autonomy have ridiculed the consequence that a contract should be void because the law referred to by the parties prohibits it. Savigny countered this objection by suggesting that the reference should be construed as not meant to include the provisions that would nullify the contract.<sup>117</sup> However, nullity in this case is a sound and natural consequence of the rule, as well as of the more or less considered will of the parties concerned, and this is the victorious opinion.<sup>118</sup>

<sup>115</sup> E.g., Recueil trib. arb. mixtes: Vol. 4, 360, 520, 534, 627; Vol. 5, 563.

<sup>116</sup> MELCHIOR 238.

<sup>117</sup> SAVIGNY § 374.

<sup>118</sup> England: See BENTWICH in WESTLAKE 303-304.

Germany: RG. (May 10, 1884) 12 RGZ. 34 rejected Savigny's opinion, no presumption of submission being required; OLG. Braunschweig (Feb. 7, 1908) 13 ROLG. 362.

France: "Less characteristic, but the possibility of annulling a contract even in case of conflict of laws is clearly admitted," BATIFFOL 51 n. 1.

The Netherlands: Hof Haag (May 17, 1923) W.111171: marine insurance having reference to English law; the clause that the policy should be the only evidence of the interest, makes the contract invalid under the Life Assurance Act, 1774, and Marine Insurance Act, 1906, s. 4 (2-b).

## IV. CHOICE OF SEVERAL LAWS

## 1. Special References

The economic interests of parties to a contract sometimes require that certain phases of their relation should be governed by particular laws, as when, for instance, examination of goods sold is subjected to the local law of the place where the goods arrive for inspection.<sup>119</sup> Accordingly, it is well settled also that the parties may refer a part of the contract to a specific law different from that governing the rest of the contract.<sup>120</sup> As choice of law is a matter of agreement, the Supreme Court of the United States says, "the agreement may select laws and also limit the extent of their applicability."<sup>121</sup>

Contractual provisions for a certain law, virtually different from that intended for the contract in general, are frequent in such matters as mode of performance and particularly currency questions, exemption from liability of common carriers by reference to section 3 of the Harter Act or similar laws, reference to the Antwerp York rules for general average in maritime contracts, or clauses concerning land securities to be subject to the *lex situs*.

<sup>119</sup> Cf. BAGGE, Recueil 1928 V at 167.

<sup>120</sup> England: DICEY 649; CHESHIRE 257; Adelaide Electric Supply Co. v. Prudential Assurance Co. [1934] A. C. 122, 145, 151; Hamlyn v. Talisker, Kwick Hoo Tong v. Finlay, see *supra* n. 108.

France: Cass. (civ.) (June 12, 1883) S.1884.1.164; (Dec. 4, 1894) D.1895.1.526; (Dec. 5, 1910) S.1911.1.129, Revue 1911, 395, Clunet 1912, 1156.

Germany: RG. (June 23, 1927) 118 RGZ. 370, 374; (Nov. 14, 1929) 126 RGZ. 196, 206; obiter dictum 122 RGZ. 316.

Italy: Cass. (Nov. 28, 1927) and (Jan. 21, 1928) Giur. Ital. 1928 I 647, Rivista 1928, 514, 4 Zausl.PR. (1930) 587.

The Netherlands: H. R. (June 13, 1924) N. J. (1924) 859, 861.

Perm. Court of Int. Justice (July 12, 1929) Series A, Nos. 20, 21; Clunet 1929, 977.

<sup>121</sup> Mutual Life Ins. Co. v. Hill (1904) 193 U. S. 551, per Mr. Justice Brewer; literally followed in Mutual Reserve Fund Life Ass'n v. Minehart (Ark. 1904) 83 S. W. 323.



A series of disputes has arisen about the scope of these references, because of the widespread indifference with which standard contract forms used in interstate and international commerce often contain inconsistent mixtures of old and new clauses. Thus, American insurance policies, for instance, have referred to the law of New York to control the contract generally and in another clause stated a waiver by the insured of notice preliminary to forfeiture, although New York law unconditionally prescribes the notice. In such a case, the Supreme Court of the United States has construed the general reference as restricted by the special clause; the law of New York could not extend its imperative force to a contract made in another state and subjected to this law only by stipulation.<sup>122</sup>

Similar combinations in bills of lading or affreightment contracts have been decided in an analogous manner, when feasible.<sup>123</sup> Reference to the Harter Act has been held in Germany to be restricted by a simultaneous broad exemption clause based on German law.<sup>124</sup> In a charter party made in New York and expressly subjected to American law, the parties inserted a clause exonerating the shipowner from liability for negligence, contrary to the Harter Act, but valid under French law obtaining at the port of discharge in Guadeloupe. The Court of Cassation in Paris recognized the ex-

<sup>122</sup> *Mutual Life v. Hill*, *supra* n. 121.

<sup>123</sup> In *Ocean Steamship Co. v. Queensland State Wheat Board* [1941] 1 K. B. 402, the bill of lading contained two clauses, the first referring to the Australian Sea Carriage of Goods Act, 1924 (instead of the provisions of the schedule only) and declaring anything inconsistent null and void, and a second subjecting the contract to the law of England. The second clause was held void because s. 9 of the Australian Act provided that the parties would be deemed to have intended to contract according to the law in force at the place of shipment and any stipulation or agreement to the contrary should be null and void.

<sup>124</sup> OLG. Hamburg (July 7, 1905) Hans. GZ. 1905, 227; (July 5, 1907) Hans. GZ. 1907, 244. In another case where the "Holland clause" (referring to Dutch Law) was inserted, it was declared compatible with the added exemption clause, OLG. Hamburg (Feb. 12, 1936) Hans. RGZ. 1936 B 243 No. 70.

emption as valid under the assumption that the parties intended to submit themselves to French law known by them as validating the clause.<sup>125</sup> It would have been simpler to admit that the special stipulation limited the general reference.<sup>126</sup> This argument was used, in fact, by the Appeal Court of Brussels when general reference to English law conflicted with an express reference to the Canadian Water Carriage of Goods Act, corresponding with the Harter Act.<sup>127</sup>

It might be argued, however, that the Hague Rules, now replacing the just-mentioned laws and adopted in the most important countries, require a stricter application. So far as they reach, they exclude party autonomy. Stipulations in the bill of lading inconsistent with the Rules may be generally understood as nullified.

A Dutch marine policy referred to the English Marine Insurance Act, 1906, and the conditions and usages of Lloyd policies "as if the policy had been signed in London," but contained a clause that payment would be due without further proof of interest than the policy itself, which clause would have made the insurance contract void under the English Act. The Supreme Court of the Netherlands decided that the reference to English law was restricted by the clause, basing this clause on Dutch law.<sup>128</sup>

The same view has sometimes been taken with regard to loan debentures under which amounts are due at one of several places, at the option of the bondholder, in the money of the place, the parties agreeing that the law of the country selected by the bondholder should determine the amount and method of payment. In this view, American law governing the currency of payment in New York should be construed

<sup>125</sup> Cass. (civ.) (Dec. 5, 1910) S.1911.1.129, *Revue* 1911, 395, *Clunet* 1912, 1156.

<sup>126</sup> See also BATIFFOL 67 n. 3.

<sup>127</sup> App. Bruxelles (Nov. 15, 1922) 61 *Jur. Port Anvers* 661.

<sup>128</sup> H. R. (June 13, 1924) N. J. (1924) 859, 1 *VAN HASSELT* 206.

as an exception, for example, to English law determining other phases of the obligation.<sup>129</sup>

## 2. Nature of Special References

Courts of various countries examining the scope of special references, often assert that they have to construe agreements only, not laws. Lord Esher said: "the parties introduce the words of the Harter Act which I decline to construe as an Act but which we must construe simply as words occurring in this bill of lading."<sup>130</sup> The language of American judges<sup>131</sup> and foreign courts<sup>132</sup> is sometimes similar. Evidently, in this connection, there is no question of a reference to foreign law valid only when it merely embodies words of foreign laws in the contractual stipulations.<sup>133</sup> But does this kind of expression yet acknowledge a difference between reference to foreign law on the basis of conflicts law and a mere transformation of foreign law into ordinary stipulations? German scholars, in fact, have stressed this alleged difference and, although recognizing both types of reference as binding, have preferred to presume that the law generally governing a contract extends to these stipulations, because this interpretation promotes the unity of law governing a contract.<sup>134</sup> Admit-

<sup>129</sup> This has been contended in criticizing the House of Lords decision in *Rex v. International Trustee etc.* [1937] A. C. 500, by the anonymous writer in 18 Brit. Year Book Int. Law (1937) 220.

<sup>130</sup> *Dobell & Co. v. Rossmore S. S. Co.* [1895] 2 Q. B. 408—C. A. Cf. *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K. B. 402, 412, 415.

<sup>131</sup> See, e.g., *Mutual Reserve Fund Life Ass'n v. Minehart* (Ark. 1904) 83 S. W. 323: reference to New York law does not mean that the statutes of New York are in force but only that they are a part of the contract. See also the language of COOK, *Legal Bases* 399.

<sup>132</sup> Belgium: App. Bruxelles (Feb. 4, 1936) Clunet 1936, 967: the provisions of the State of New York, by being referred to in the stipulations, changed their character from legal to conventional.

Germany: OLG. Hamburg (March 17, 1913) Hans. GZ. 1913, HBL. 157, 158, *aff'd*, RG. (Jan. 28, 1914) Hans. GZ. 1914, HBL. 108: the Australian Sea Carriage Act of 1904 had become part of the contract.

<sup>133</sup> *Supra* p. 360.

<sup>134</sup> See HAUDEK 38; MELCHIOR 523 § 384; WOLFF, IPR. 88. This view

tedly, however, average parties are not at all aware of this subtle contrast, nor are the courts prepared to observe it.<sup>135</sup> They, definitely, presuppose a plurality of laws whose border line only needs analysis. By the above language, the courts seek to emphasize only that the scope intended by the specially invoked law is not binding, even though it is intended to be compulsory; that the court is free to assume to what extent the parties have referred their obligations to that law; that the reference is to be reasonably interpreted and restricted.<sup>136</sup>

If the courts were to follow the suggestion mentioned they would have to favor the more general reference at the cost of the special clause. But the judicial inclination is just to the contrary. Courts profess that the special clause derogates from the general one.

In addition, a mere incorporation of a foreign rule in stipulations would have the result that, if the rule is changed subsequent to the contract, the obligation would not be affected. This, as said earlier, is an undesirable effect.

But it may be asked, instead, whether parties are permitted, if they so intend, to limit the reference to the unchanged text of a certain legal rule. The question came up on the occasion of the American loans in the nineteen-

seems to be shared by KAHN-FREUND, *Annual Survey of English Law* (1940) 254. For a different distinction, which I believe to be the correct one, see *infra* Chapter 32, II, 3, p. 534.

<sup>135</sup> In RG. (Nov. 24, 1928) 122 RGZ. 316 cited by MELCHIOR 522 n. 3 for his thesis, the court expressly stated that a particular stipulation may be subject to a separate law. This was not altered by the correct decision in the case at bar that the litigious question of who has to bear extraordinary costs in a sea carriage, was covered by the main reference to English law. In RG. (Nov. 14, 1929) 126 RGZ. 196, 206 (cited by MELCHIOR 522 n. 4) it was stated that the presumptive intention of the parties, decisive according to German, not the Austrian, conflicts law, excluded the Austrian law from the question of effects exercised by Austrian decrees.

<sup>136</sup> See, e.g., *Mutual Life Insurance Co. v. Hill*, *supra* n. 121, at 557: "... the laws of New York are controlling in any respect only because the parties have so stipulated, and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract."

twenties to European governments, cities, and corporations. Interest and capital were payable in gold dollars. When by the Joint Resolution of Congress in 1933 recovery in gold coins as well as in gold value was prohibited, bondholders attempted to save their claims by contending that a reference made in the contract debenture, and possibly in the bond, to the law of New York, was not intended to include the unforeseeable American dollar depreciation. The German Reichsgericht replied that "one cannot select a national law and exclude its imperative rules. Only an unrestricted submission assures that the contract be disciplined, if necessary, against egoistic purposes of the economically stronger party or even both parties, considering the general interests in changing times. . . ." <sup>137</sup>

There was no doubt about the correct interpretation of the individual loan agreements. None of them could be understood otherwise than as taking the Joint Resolution in its stride, since the alternative would have been the complete lack of an applicable law, an impossible result. <sup>138</sup> In theory, however, the problem of conditional references to a legal rule is new and unsettled. <sup>139</sup>

<sup>137</sup> RG. (May 28, 1936) JW. 1936, 2058; cf. 10 Z.ausl.PR. (1936) 385.

<sup>138</sup> RABEL, 10 Z.ausl.PR. (1936) 509, 513.

<sup>139</sup> For the negative solution, see WOLFF, 49 Jurid. Rev. (1937) at 124; for the affirmative, NUSSBAUM, "Comparative and International Aspects of American Gold-Clause Abrogation," 44 Yale L. J. (1935) at 83; for reasons of doubting, DUDEN, 9 Z.ausl.PR. (1935) 625.

## Theories Restricting Party Autonomy

MANY objections have been raised against the right of parties to select their law. Often overlapping and elusive, they may be distinguished according to their main ideas.

## I. DOCTRINES OF GENERAL SCOPE

## 1. Doctrines Reserving Imperative Rules

(a) *Imperative rules of a predestined law.* As mentioned before, in the majority opinion of the scholars, every contract is born into a certain law, the "imperative rules" of which it cannot escape. That is, any rules of this law which parties cannot modify by contracting in a purely domestic sphere, they do not avoid by an agreement that another law should govern.<sup>1</sup>

Although the numerous followers of this doctrine are categorical in asserting that imperative rules are inescapable, they strongly disagree in determining what rules are imperative. The learned reporter of the Institute of International Law, Baron Nolde, sternly warned against the frequent tendency of the literature<sup>2</sup> to reduce these norms to a small number of secondary problems identical with what is properly called "*ordre public*." These concern such classic examples as wagering, usury, smuggling, or social protection. Im-

<sup>1</sup> The arguments have been expounded with particular authority by LORENZEN, 30 Yale L. J. (1921) 565; NIBOYET, Recueil 1927 I, 13, 36, 53, 62; PILLET, Principes § 227; AUDINET, 1 Mélanges Pillet 65.

<sup>2</sup> As a recent example, see the convincing demonstration by ESMEIN in 6 Planiol et Ripert, Traité Pratique 646 that provisions of domestic law, protecting the weaker parties or the interests of society in general or good morals, can not simply be transposed into the international field.

perative rules, on the contrary, according to the reporter's energetic assertion, cover a "vast and normal domain," including formation and validity of contracts, the principle of freedom of contracting, the *clausula rebus sic stantibus*, rescission on the ground of nonperformance, the effect of contracts on third persons, assignment, plurality of subjects of obligations, "many" of the rules concerning discharge of obligations, and a "very great number" of rules dispersed in the codes including those on collective bargaining.<sup>3</sup> Thus, not much remains for agreements of parties, nor is it easy to see exactly what their sphere may be.

This entire theory has influenced a few recent legislative texts,<sup>4</sup> but it has been opposed at least by Anzilotti<sup>5</sup> in the Institute, and more recently thoroughly refuted by English, French, and German writers.<sup>6</sup> It has no real background in any of the significant court practices.

Nevertheless, in a new variant, the predestined law has taken the form of the locally "most closely connected law," pretending to decide whether the parties may submit to another law.<sup>7</sup> Discussion may be deferred until we meet the problem of territorial limits to autonomy (*infra* p. 403).

(b) *Lex loci contractus necessarily governing validity.* The idea that every contract necessarily depends on the law of the place where it is made and, hence, is in an intimate and

<sup>3</sup> 32 *Annuaire* (1925) 52-57.

<sup>4</sup> *Supra* pp. 372-373.

<sup>5</sup> 32 *Annuaire* (1925) 512.

<sup>6</sup> See Vol. 1, pp. 83-87. The last committee draft on the conflicts rules for sales of goods (1931) satisfied the opinion expressed by the great majority of governments in extending party autonomy to the "imperative rules." Art. 2 par. 1 says simply: "The sales contract is governed by the internal law of the country indicated by the parties to the contract," and par. 3 expressly includes "the conditions relating to the consent of the parties." See 7 *Z.ausl.PR.* (1933) 957; the committee report by JULLIOT DE LA MORANDIÈRE has been printed as confidential.

<sup>7</sup> MORRIS, "The Proper Law of a Contract in the Conflict Laws," 56 *Law Q. Rev.* (1940) 320, 337.

inseparable conjunction with this law, is old. It goes back to Bartolus<sup>8</sup> and was revived by the scholars believing in vested rights.<sup>9</sup> Modern writers added their perennial fear of a *circulus inextricabilis*: party autonomy would determine the law which itself permits party autonomy.<sup>10</sup> It is also argued that the essential requisites of contracts are regulated by "imperative" rules where the contracts originate,<sup>11</sup> thus resuming the thesis mentioned before.

The old doctrine has undoubtedly left some vestiges. In the nineteenth century, even in the French courts, it preceded the revival of the principle of autonomy<sup>12</sup> and, in its application to such contracts as transportation, seems to have retained much vigor.<sup>13</sup> Remnants in this country are even more noteworthy in Beale's works,<sup>14</sup> but they have their securest domain outside of conflicts law proper, in defining the power of a state to subject contracts to its domestic law notwithstanding the due process clause.<sup>15</sup>

At present, Switzerland is the only important jurisdiction following this idea in its proper meaning, that is, making the *lex loci contractus* exclusively applicable without any possi-

<sup>8</sup> BARTOLUS, *ad l. Cunctos Populos* § 13, *infra* p. 444.

<sup>9</sup> See, among many others, AUDINET, 1 *Mélanges* Pillet 67; ROLIN, 1 *Principes* § 310; STRISOWER and NEUMEYER, cited by NOLDE, *Revue* 1926, 448; MINOR 401; BEALE, *Summary* § 2 and 23 *Harv. L. Rev.* (1910) at 270.

<sup>10</sup> E.g., NIBOYET, 1 *Répert.* 248 No. 37; Judge Learned Hand's "bootstraps" theory, *supra* p. 374 n. 63. *Contra*: see WAHL, 3 *Z.ausl.PR.* (1929) 791; HAUDEK 64; BATIFFOL § 386; MAYER, *op. cit.* (*supra* Chapter 28 n. 8) 111, 131.

<sup>11</sup> NIBOYET, 16 *Recueil* (1927) I 35ff. *Contra*: WAHL, 3 *Z.ausl.PR.* (1929) 805.

<sup>12</sup> See BATIFFOL 27-29 § 32.

<sup>13</sup> Cass. (civ.) (Feb. 23, 1864) S.1864.1.385; BATIFFOL 258 § 284.

<sup>14</sup> A decision influenced by the Restatement, *Commissioner of Internal Revenue v. Hyde* (C. C. A. 2d 1936) 82 F. (2d) 174 understands the clause of a trust made in France that it was "to be construed and interpreted by the law of New York" as not including the validity but only the meaning and effect of the terms. In the argumentation of the court, the intention of the parties is not supposed to be that they would withdraw the question of validity from the *lex loci contractus*—"nor would such intention, if expressed, be controlling."

<sup>15</sup> See *Alaska Packers Ass'n v. Ind. Accident Comm.* (1935) 294 U. S. 532, and STUMBERG 60.



bility for the parties to change the rule. The Federal Tribunal in constant practice applies the law of the "place of contracting" to all legal requisites of validity, such as offer and acceptance, consent, permissibility, significance of error, fraud or duress.<sup>16</sup> The parties may determine the law governing the "effects" of a contract, but not that concerning its "validity."

The Restatement pronounces a similar rule,<sup>17</sup> on the background, however, of a total exclusion of party choice.

(c) *Illegality under lex loci contractus invalidating the contract.* One of Dicey's influential exceptions to the proper law theory states that validity of a contract under the proper law is of no avail if the making of the contract is unlawful under the *lex loci contractus*.<sup>18</sup>

This statement, distinguishable from its probable mother rule, above *sub* (b), precariously reposes on Lord Halsbury's well-known opinion. Although terming untenable the proposition that a prohibition by the *lex loci contractus* could always prevent us from enforcing a contract,<sup>19</sup> he added:

"Where a contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of a contract at all, then the contract would be void all over the world and no civilized country would be called on to enforce it."

Such a contract regarded as illegal, that is, "criminal" at the place where it is made, would be regarded all over the world as obnoxious to public policy and therefore void, though not illegal. As a result, the House of Lords in *In re Missouri* minimized the force of the Massachusetts statute prohibiting

<sup>16</sup> See BGE.: 23 I 822; 32 II 415; 38 II 519; 44 II 280; 49 II 73.

<sup>17</sup> Restatement § 332, *cf.* § 358.

<sup>18</sup> DICEY 655 exception (2) to Rule 160; FOOTE 402. See for criticism MANN, "Proper Law and Illegality in Private International Law," 18 Brit. Year Book Int. Law (1937) 97, 103; CHESHIRE 278.

<sup>19</sup> *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321, 336; accepted as the law by Greer, L. J., in *The Torni* [1932] P. 78, 88.

exemption from carrier's liability. Its violation, hence, was not a case of a "criminally" or morally tainted foreign offense that would move an English court. The distinction was made in remembrance of a curious old contrast between *mala in se* and *mala prohibita*, which a judge in 1822 had declared "long since exploded."<sup>20</sup>

More recently, Lord Wright in his turn, in the *Vita Food's* case,<sup>21</sup> has commented on Lord Halsbury's dubious dictum in another questionable way.<sup>22</sup> The fact is, however, that in all these cases and others, the judgment for validity was based purely on English law considered as governing the contract, despite the law of the place of contracting.

Only one English case, *The Torni*,<sup>23</sup> is apparently consistent with the alleged rule, but its well-considered reason lies elsewhere,<sup>24</sup> and has been rejected by the decision in the *Vita Food's* case.

The conclusion had been reached even before the last-mentioned decision that invalidity under the law of the place of contracting as such is simply immaterial in English courts.<sup>25</sup> Legality is determined by the proper law, except that enforcement may be refused also on the ground of the public policy of the forum.

Apart from academic theses, in this country obiter dicta may be found, such as in a supreme court decision, that parties outside of the state of New York may make the laws of this state controlling upon both parties,

"Provided such provisions do not conflict with the law or public policy of the State where the contract is made."<sup>26</sup>

<sup>20</sup> Best, J., in *Bensley v. Bignold* (1822) 5 Bar. & Al. 335, 341 noted by MANN, *supra* n. 18, 104 n. 1; cf. WILLISTON, 6 Contracts 5006 § 1764.

<sup>21</sup> *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277, 297, P. C.

<sup>22</sup> See COOK, Legal Bases 421ff.

<sup>23</sup> [1932] P. 78.

<sup>24</sup> *Infra* p. 427.

<sup>25</sup> CHESHIRE 278.

<sup>26</sup> Mr. Justice Brewer in *Mutual Life Ins. Co. v. Hill* (1904) 193 U. S.

This general formula is hardly more than a tribute to school reminiscences. In no other country is there any sizeable following of this theory.<sup>27</sup>

(d) *Prevailing rule.* All versions of a predestinated law have been abandoned by the present jurisprudence of mercantile countries. The English view is beyond any doubt. French and German courts definitely apply the law upon which the parties agree, with all its implications, and do not apply another law solely because it would be applicable in the absence of a party intention.<sup>28</sup>

*Illustration.* In a case decided by the Mixed Anglo-German Arbitral Tribunal in 1922, a contract entered into by correspondence between an English and a German member of the Liverpool Cotton Association, made subject to the Rules of this Association and thereby to the jurisdiction of the High Court of Justice and the law of England, was held valid under this law. It was immaterial which law would have

551. Similarly, a few Massachusetts decisions concerning insurance statutes, *infra* n. 83.

<sup>27</sup> The only exception known to me is a surprising contention by NUSSBAUM, D. IPR. 244 repeated in 51 Yale L. J. (1942) 908, Principles 176; against which see GUTZWILLER, 8 Zausl.PR. (1934) 656; MANN, *supra* n. 18, at 103, and Book Review, 7 Modern L. Rev. (1944) 172; RAAPE, D. IPR. 253; STAUB-HEINICHEN in 3 Staub 556 n. 11a. For the dominant view that illegality arising out of making the contract is treated like other questions of validity, see STUMBERG 242 n. 33.

<sup>28</sup> England: It suffices to refer to the opinions of the Privy Council in the Vita Food's case, *supra* n. 21.

Belgium: POULET 372 § 299 n. 2 reproaches the Belgian courts since they do not distinguish between supplementary and imperative rules.

France: The court decisions ought to be discussed at the proper places, but even ARMINJON, 2 Précis (ed. 2) 257 n. 1 § 79, cites only one decision, Cass. (civ.) (Jan. 8, 1913) S.1913.1.243, as being reluctant to admit all consequences of party autonomy. The decision refuses to recognize that an arbitration stipulated in the contract may judge the question of fraud, because French courts give effect only to conventions freely consented. Thus freedom of contracting is a ground for public policy overriding the conflicts rule which in itself is not contested.

Germany: See the stringent documentation by MELCHIOR 506ff.

Portugal: VEILJA BEIRÃO, draftsman of the C. Com., commented on art. 4 to the effect that every rule may be changed by the parties, except that on capacity. Only the subsequent doctrine introduced the "imperative" rules. See ESPINOLA, 8 Tratado 538.

governed without this submission and whether the contract would have been unenforceable under the German prohibition against dealing in futures.<sup>29</sup>

In the United States, the questions involving validity of the contract are decided in a majority of states according to criteria other than the law of the place of contracting, and often according to the intention of the parties. The dogma postulated by Beale exists nowhere.

## 2. Evasion

(a) *Fraudulent evasion.* The French doctrine of "*fraude à la loi*," although slowly vanishing, in certain cases has been applied, under an apparently broad formula, to stipulations in favor of a foreign law, when a contract was both made and to be performed in France.<sup>30</sup> However, the nucleus of these cases consisted in c.i.f. sales contracts on overseas grains, made between Frenchmen in France under the standard forms of the London Corn Trade Association and similar to those under which the seller had bought the goods overseas. That nullity of such agreements violated the interests of international commerce, was recognized by the Court of Cassation itself. Moreover, it is characteristic of the crude method protecting some true or imagined domestic public interest by the theory of fraud, that in most cases the required evidence of "fraudulent" evasion could not be produced.<sup>31</sup>

(b) *Contracts without foreign elements.* The German Reichsgericht once nullified a stipulation of choice of law in an isolated case. An agreement with a matrimonial agency

<sup>29</sup> Gruning & Co. v. Gebr. Fraenkel (Feb. 6-17, 1922) 1 Recueil trib. arb. mixtes 726. To the contrary effect, for instance, the Czechoslovakian Supreme Court (March 2, 1934) 10 Z.ausl.PR. (1936) 168: action for the balance arising out of a grain transaction, dismissed on domestic standards. For this application of public policy, see *infra* Chapter 33 pp. 568 ff.

<sup>30</sup> Cass. (civ.) (Feb. 19, 1930) and (Jan. 27, 1931) S.1933.1.41; and cases mentioned by BATIFFOL 63 n. 4.

<sup>31</sup> BATIFFOL § 70.

was made and to be performed in the Kingdom of Saxony, both parties being resident there. The contract referred to Prussian law which, in contrast to the Saxon, considered valid a promise of award given to a matchmaker.<sup>32</sup>

Here, indeed, the transaction belonged, personally and substantially, to one jurisdiction, lacking all and any foreign elements; the parties referred to a foreign law exclusively for the purpose of evading a prohibition intended to maintain good morals. The case deserves to be noted in this respect but has often given rise to exaggerated conclusions.

(c) *Lex fori in imperative role*. The Austrian and several Latin-American Codes have gone so far as to make the law of the forum imperative in large groups of cases, such as those where the contract is performable in the country or where nationals of the country contract abroad.<sup>33</sup> A similar provincialism occurs in sporadic cases throughout the world, when a court for the protection of a resident believes itself entitled to apply its domestic statutes without justifying a stringent public policy of the forum.

(d) *American law*. The American position is not simple to state. It appears that repeatedly stipulations of choice of law have been disregarded, for varying reasons or sometimes almost without justification, evidently on the ground of a belief such as that expressed by Beale that the parties have no right to select a law. However, these cases are a small minority. Furthermore, they belong, with isolated exceptions, to certain groups which we shall have to discuss hereafter (*sub* II and III). Anticipating the result, we may note that the cardinal rule, also in this country, particularly at present, is the acknowledgement of the right of the parties to de-

<sup>32</sup> RG. (Sept. 21, 1899) 44 RGZ. 300.

<sup>33</sup> E.g., Argentina: C. C. art. 1243 (1209).

Mexico: C. C. art. 13.

See for more details *supra* Chapter 28, pp. 370-372.

terminate the law, and all exceptions that can seriously be sustained simply flow from public policy.

### 3. Requirement of Substantial Connection

In a current of dicta, English and American authorities have required as a matter of course, that the intention of the parties to select a law must be confined within certain limits. American courts have said that an agreement of the parties to choose a law should be "made with a bona fide intention,"<sup>34</sup> not "fictitious,"<sup>35</sup> based on "a normal relation"<sup>36</sup> or a "natural and vital connection."<sup>37</sup> English decisions have declared that the chosen law ought to have "a real connection with the contract,"<sup>38</sup> or that the intention expressed should be "bona fide and legal."<sup>39</sup> Also, the German Supreme Court has sometimes mentioned that the parties may stipulate a law in material connection with the obligation,<sup>40</sup> and similar views are likely to occur in other courts.<sup>41</sup> Some theoretical backbone was sought for all these propositions in the doctrine of Westlake:

"That the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the

<sup>34</sup> 2 WHARTON 1210 § 510 (o) is cited for this requirement in *Seeman v. Philadelphia Warehouse* (1928) 274 U. S. 403, 408.

<sup>35</sup> *Crawford v. Seattle etc. R. Co.* (1915) 86 Wash. 628, 150 Pac. 1155.

<sup>36</sup> *Seeman v. Philadelphia Warehouse* (1928) 274 U. S. 403, 408; *Brierley v. Commercial Credit Co.* (D. C. E. D. Pa. 1929) 43 F. (2d) 724, *aff'd*, *id.* 730.

<sup>37</sup> 2 WHARTON 1210 § 510 (o); *Green v. Northwestern Trust Co.* (1914) 128 Minn. 30, 150 N. W. 229 (usury).

<sup>38</sup> *South African Breweries v. King* [1899] 2 Ch. 173, *aff'd* [1900] 1 Ch. 273.

<sup>39</sup> *Lord Wright in Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277 at 290.

<sup>40</sup> RG. (July 5, 1910) 74 RGZ. 171, 173; (July 8, 1910) *Recht* 1910 No. 3358; (April 4, 1928) IPRspr. 1929 No. 31; (May 28, 1936) JW. 1936, 2871.

<sup>41</sup> France: App. Rennes (July 26, 1926) *Clunet* 1927, 659, *Revue* 1927, 523, reversed by Cass. (civ.) (Feb. 19, 1930) *Clunet* 1931, 90, *Revue* 1930, 282.

Switzerland: BG. (July 16, 1898) 24 BGE. II at 544, *cf.* HOMBERGER, *Obl. Verträge* 45.

country with which the transaction has the most real connection, and not the law of the place of contract as such."<sup>42</sup>

It should be noted that this famous passage in an excellent formulation advocates an objective construction of the applicable law, in criticism of the traditional mechanical application of the law of the place of contracting. Whether the idea was latent in Westlake that a law to be selected by the parties must have some connection with the contract, is not clear.<sup>43</sup> Certainly, he did not pretend that the parties have to choose just that law which a judge would think to be in the closest connection—as recent English writers propose.<sup>44</sup>

In fact, other writers,<sup>45</sup> with whom Cook apparently associated himself,<sup>46</sup> conclude that choice by parties is limited to those countries with which the contract has a "substantial" connection. Hence, in the cases of multiple local connections, the parties may select *any one* of these contacts, if it is not merely accidental; they are not bound to select the one contact which a judge would assume to be the *most* vital. Otherwise, the axiom would indeed abolish autonomy altogether. But even so, we notice at once that this establishes a broad theory against evasion which nevertheless does not prevent the parties from choosing a foreign law having some "substantial" connection with the contract but rejects claims of the forum grounded on a much closer connection. Such a

<sup>42</sup> WESTLAKE 212.

<sup>43</sup> Cf. WESTLAKE 287 and the note by BENTWICH in WESTLAKE 289; cf. DICEY 965.

<sup>44</sup> MORRIS, 56 Law Q. Rev. (1940) 320, 337, CHESHIRE being cosigner of the article.

<sup>45</sup> HAUDEK 39; MELCHIOR 506; SCHLEGELBERGER, Die Entwicklung des Deutschen Recht in den letzten fünfzehn Jahren (1930) 133, see 4 Z.ausl.PR. 417; M. WOLFF, IPR. 86, *id.* in 49 Jurid. Rev. (1937) 119, 121, and in Priv. Int. Law 424 (where he contends that this is the prevailing continental opinion; I doubt this contention); BATIFFOL 52 § 57.

<sup>46</sup> COOK, Legal Bases 423, unaware of the continental discussion, developed his views very cautiously and rather ambiguously; he expounded them more firmly, however, in his last article, 21 Can. Bar Rev. (1943) 249, 253.

theory is unable to replace that of public policy. What, then, is its value? And why can the forum not tolerate a foreign law not "connected" at all with the contract, when not harmful to its public policy? With these questions in mind, we shall register what further information can be gained.

The Polish Law on private international law has preferred another approach. It enumerates the law open to choice as follows:

The parties may submit an obligation to the law of the national state, the law of domicile, the law of the place of making the transaction, the law of the place of performance, or the law of the place of situs.<sup>47</sup>

In Beale's system the question is nonexistent, but the places of contracting and performance are the only ones he recognizes at all as contacts.<sup>48</sup>

Feeling that the familiar formulas include much obscurity, Lord Wright, speaking for the Judicial Committee of the Privy Council in the much discussed *Vita Food's* case, has had the merit of attempting clarification. On the rule that the ascertained intention of the parties is conclusive, he observes:

"It is objected that this is too broadly stated and that some qualifications are necessary. . . . But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."<sup>49</sup>

Again, this comment needs supercomment. What does "bona fide" and "legal" mean?<sup>50</sup> Had the court in mind

<sup>47</sup> Art. 7. See against this attempt of regulation, HAUDEK 44.

<sup>48</sup> 2 BEALE 1127 n. 8, 1159 n. 4, 1166 n. 6. *Contra*: see BATIFFOL 53 n. 3 and 4.

<sup>49</sup> [1939] A. C. 277 at 290.

<sup>50</sup> See Note, 55 Law Q. Rev. (1939) 323, 325.



evasion under qualifying circumstances? Yet Lord Wright was prepared to give effect to a most obvious escape from Newfoundland to English law, in a case of an affreightment beginning in Newfoundland, "even where the parties are not English and the transactions are carried on completely outside England."

As mentioned earlier, a citizen of Ecuador who had no ties with England and a Canadian corporation contracting in New York could validly submit to English law in the eyes of an English court.<sup>51</sup>

There is more reason for wonderment. Apart from frequent references in the American usury cases, which are a special matter, when courts mention the requirement in question,<sup>52</sup> they quite regularly do so in order to state that in the case at bar the contract does have a sufficient connection with the chosen law. This is true for most American as well as for all English and German decisions,<sup>53</sup> and this is only natural. In regular commerce, parties never select a law having "no" relation to their obligations.<sup>54</sup>

The Supreme Court of Rhode Island, however, in the case of an employment contract, once made serious use of the alleged rule that questions of validity and construction cannot be referred by the parties to the law of a state in which the contract is not made nor to be performed.<sup>55</sup> For some reason

<sup>51</sup> *British Controlled Oilfields v. Stagg* (1921) 66 Sol. J. 18, *supra* p. 381 n. 91.

<sup>52</sup> Out of 18 cases considered in the note, "Validity and effect of stipulation in contract etc.," 112 A. L. R. 124 to 130 (left), only three are not concerned with usury. One trust case is without significance. On the two others, namely, *Gerli v. Cunard S. S. Co.*, involving bills of lading, see *supra* p. 374 n. 63, and on the principal case, *Owens v. Hagenbeck*, see below n. 55.

<sup>53</sup> For the American cases see BATIFFOL 41 n. 1. In England, the decision in "The Torni" is no counter-instance and its main argument has been challenged in the *Vita Food's* case. The German decisions cited *supra* n. 40 have in each case approved of the stipulation.

<sup>54</sup> See MELCHIOR, 3 Z.ausl.PR. (1929) 179.

<sup>55</sup> *Owens v. Hagenbeck-Wallace Shows Co.* (R. I. 1937) 192 Atl. 158, *aff'd*, 464, 112 A. L. R. 113.

unfortunately not revealed in the case, the employing circus enterprise, whose permanent address was Chicago, localized the contract in Sarasota County, Florida. Counsel for the firm adduced dubious evidence for his plea that under the Florida decisions the plaintiff could be dismissed practically at the defendant's pleasure. The court, quite evidently moved by a strong feeling of social equity, rejected the plea by refusing the express reference to Florida law, allegedly not substantially connected with the contract, and simultaneously eliminated as not proved, the law of Indiana where the contract in fact was executed. Massachusetts, where the defendant gave written notice and where the circus was held until the expiration of the term for dismissal, was not further mentioned. Thus, the Rhode Island court seized of the suit during a brief performance in Providence, believed itself entitled to apply the law of its own state, which had no connection whatever with the contract. This happened in the name of the requirement of close connection. An arbitrary use of conflicts rules, once more, had to lead, on an easy though incorrect way, to an equitable decision.

Of course, there is a practical question involved. Originally, the writers seem to have believed that choice by the parties is geographically limited,<sup>56</sup> and the Polish list of permitted contacts reaches the same result. In international relations, however, there are many cases in which a contract ought to follow the legal fate of another agreement. When a grain shipment under a form of the London Corn Trade Association, arriving from Argentina to Bordeaux, is resold by the French buyer to another Frenchman in France, this is a "*contrat de suite*." The middleman in this frequent situation is in dire straits if he is liable to his successor on warranties

<sup>56</sup> Clearly so, HAUDEK 39, rejecting (40 n. 3) my opinion (*infra* n. 57) with the contention: when goods sold do not touch English territory, the interest of the parties in English law which they select, is not based on the international structure of the contract but is only personal to the seller.

not covered by his rights of recourse against the Argentine vendor.<sup>57</sup> As early as 1909, a German appeal court expressly denied the existence of a public policy precluding two German merchants in grain from submitting to London arbitration and English law.<sup>58</sup> French courts, haunted by their fear of "*fraude à la loi*," could not satisfy this need, but their mistakes will probably not be repeated anywhere else.<sup>59</sup> Normal economic interests of those engaged in international trade must be as well safeguarded as trade within a territory.

Other examples of "entailed contracts," which should conveniently be adjusted to the law that governs another contract, have been adduced, such as a bond for a foreign debt,<sup>60</sup> reinsurance, and subsequent insurance for merchandise *in transitu* on a vessel.<sup>61</sup> Analogous reasoning would quell doubts, when a debt guaranteed by mortgage in one state, is expressly subjected to the law of the situs, even though no other contact with it existed.<sup>62</sup>

A reference to English law will not be rejected by English or German courts whenever a certain type of contract is internationally unified according to English commercial customs, irrespective of the individual parties to the contract.<sup>63</sup> International commerce, indeed, must escape the narrow margins of any formula binding the parties to one or the other of their domiciliary laws and look for unified usages and stipulations.

<sup>57</sup> RABEL, 4 Z.ausl.PR. (1930) 417 followed by WOLFF, IPR. 87; RABEL, 1 Recht des Warenkaufs 53; BATIFFOL 54 § 59.

<sup>58</sup> OLG. Rostock (Feb. 22, 1909) 65 Seuff. Arch. No. 1, 20 Z.int.R. 92.

<sup>59</sup> *Supra* p. 400.

<sup>60</sup> BATIFFOL 56; M. WOLFF, IPR. 87 and in 49 Jurid. Rev. (1937) 120.

<sup>61</sup> Cases brought to attention by HAUDEK 41.

<sup>62</sup> In *American Freehold Land & Mortgage Co. v. Jefferson* (1892) 69 Miss. 770 the parties stipulated for the law of Mississippi where the land security was. The court held the stipulation to be void (*infra* n. 73) whereas the case is suitable to demonstrate the need of a clear recognition of such agreements.

<sup>63</sup> See CLAUGHTON SCOTT, Conférence de la Haye, Actes de la Sixième Session 296; M. WOLFF, 49 Jurid. Rev. (1937) 120 and Priv. Int. Law 428 § 402.

It has been conceded, moreover, that parties may select a law for the reason that they know it well or because it is competently elaborated.<sup>64</sup> For this reason, English courts seem always to recognize the reference to English law. Why should they not? Why, indeed, should an American court not allow residents of the Philippines and Australia to agree in a contract on the application of the law of California?

Finally, as is well known, English courts are inclined to accept submissions to English law without any qualification. This has recently been advocated in generalized form as a privilege for the *lex fori* of all countries.<sup>65</sup> But in a reasonable international private law, it should not be so significant which forum is seized of the case.

It seems after all that the alleged general rule limiting the choice of law by the parties to a determined number of legislations, does not and should not exist. Its possibly more serious purpose is sufficiently defined through the old concept of evasion of some law; but this purpose must be pursued on the basis of its own merits—which are very small.

## II. SPECIAL AMERICAN DOCTRINES

The following topics cannot be treated without anticipating in some respects the conflicts rules existing in case the parties have not determined the applicable law, but such discussion is needed for a final judgment on the limits of party autonomy.

### I. Usury Statutes<sup>66</sup>

In regulating the rate of interest in loan contracts, the various jurisdictions employ different methods and permit varying amounts. With respect to a contract fixing interest

<sup>64</sup> Such a situation evidently occasioned the party agreement in *British Controlled Oilfields v. Stagg* (1921) 66 Sol. J. 18; BATIFFOL 55 § 60.

<sup>65</sup> M. WOLFF, *Priv. Int. Law* 428 § 403.

<sup>66</sup> No comparable doctrine exists abroad.

without an additional stipulation for the applicable law, former divergent conceptions have been finally superseded by a habit of maintaining the stipulated rate, provided that it is agreeable to some law connected with the contract, such as the law of domicile of either party, or that of the place of payment, or sometimes that of the situs of a land security.<sup>67</sup> Thus, if a loan is made by a Pennsylvania corporation to a resident of New York, who even pledges certain property in New York as security, the Supreme Court of the United States has declared the agreement lawful, although it would have been void under New York law. Mr. Justice Stone said:

" . . . We think it immaterial whether the contract was entered into in New York or Philadelphia. . . . Respondent, a Philadelphia corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Philadelphia in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed."<sup>68</sup>

In this group of cases, we find in fact a combination of two tendencies that have been generalized in the literature. One idea is that several state laws are connected with the contract and the judge may choose among these but no other laws.<sup>69</sup> The other impulse is given to favor the law upholding the stipulation. Thus, this entire doctrine does not serve as a limitation but as a favor to the contract.

As a third feature of the cases, however, the connection has to be "real," not "fictitious." The North Carolina court, finding that payment under a contract was arranged to be made in another state solely for the purpose of avoiding the

<sup>67</sup> See STUMBERG 212; GOODRICH § 108; 2 BEALE § 347.4; cf. also 6 Banks and Banking (Michie 1931) 199 and Supp. (1945).

<sup>68</sup> Seeman v. Philadelphia Warehouse Co. (1927) 274 U. S. 403.

<sup>69</sup> Arnold v. Potter (1867) 22 Iowa 194.

usury statute of North Carolina, applied the latter.<sup>70</sup> In this sense, the stipulation of interest must be covered by the law of one of the places bona fide involved in the case. *Bona fide* seems to mean that the place should not be *intentionally* selected for the purpose of evasion.

*Stipulation for a law.* It is in this light that we must regard the approximately twenty-six decisions dealing with stipulations on the applicable law.<sup>71</sup>

Of fourteen usury cases holding such stipulation void, eleven invalidate it because it refers to a foreign law conflicting with that of the forum.<sup>72</sup> Only one old Mississippi case protests against the advantage taken of its own usury statute in a contract made in either New York or Tennessee; it is a singular case also in the respect that the situs of the mortgage in the state, for most courts one of the most vital contacts, is disregarded.<sup>73</sup> Another case, in a lower court, disregarding the reference to Virginia law because the contract has more relation to the District of Columbia, concerns a loan corporation chartered in Virginia but operating in fact in Washington, D. C. The judge observes that if the payment had been stipulated to be in Virginia, the stipulation would have been proper.<sup>74</sup>

<sup>70</sup> *Meroney v. Atlanta National Building and Loan Ass'n* (1893) 112 N. C. 842, 17 S. E. 637; *Ripple v. Mortgage and Acceptance Corp.* (1927) 193 N. C. 422, 137 S. E. 156. See also *infra* ns. 74 and 75.

<sup>71</sup> I am much indebted to Mrs. Oberst, formerly Elizabeth Durfee of Ann Arbor, for her excellent contribution in establishing the list of these cases and the conclusions to be inferred from them.

<sup>72</sup> *Falls v. U. S. Savings, Loan and Bldg. Co.* (1893) 97 Ala. 417; *Meroney v. Atlanta Building and Loan Ass'n* (1895) 116 N. C. 882; *U. S. Savings & Loan Co. v. Scott* (1896) 98 Ky. 695, 34 S. W. 235; *Locknane v. U. S. Savings & Loan Co.*, (1898) 103 Ky. 265; *Fidelity Savings Ass'n v. Shea* (1899) 6 Ida. 405; *Bldg. & Loan Ass'n of Dakota v. Bilan* (1899) 59 Neb. 458; *Snyder v. Fidelity Savings Ass'n* (1901) 23 Utah 291; *Floyd v. National Loan & Investment Co.* (1901) 49 W. Va. 327; *United Divers Supply Co. v. Commercial Credit Co.* (C. C. A. 5th 1923) 289 Fed. 316; *Brierley v. Commercial Credit Co.* (C. C. A. 3d 1930) 43 F. (2d) 730, *cert. denied*, 282 U. S. 897; *Bundy v. Commercial Credit Co.* (1931) 200 N. C. 511.

<sup>73</sup> *American Freehold Land & Mortgage Co. v. Jefferson* (1892) 69 Miss. 770, *supra* n. 62.

<sup>74</sup> *Stoddard v. Thomas* (1915) 60 Pa. Super. Ct. 177, 181.

It is impressive that nine of these fourteen cases were prior to 1902. In the few others, the principle that any law having a substantial connection with the contract suffices, is expressly adopted. In the four last cases (of 1923, 1930, and 1931), the place of incorporation of the lending Delaware company, different from its principal place of business, is discarded, but the rate stipulated in the contract is nevertheless saved by judicial choice of another law validating the contract.<sup>75</sup>

Twelve decisions, from 1865 to 1937, agree in applying the stipulated law, which in half of the number was that of the borrower and in the rest that of the lender.<sup>76</sup> A Kansas decision holding a stipulation for Colorado law valid, since many elements of the contract related to Colorado, refuted the contrary opinion, as follows:

"The position assumed by some courts in reference to this matter, when considering building and loan association cases, can scarcely be regarded as anything less than the result of a *tour de force*."<sup>77</sup>

Thus, the courts in this matter are not satisfied with the mere fact that the parties have signed the agreement. They analyze the facts in order to see whether enough elements support the stipulated localization, with the alternative that the parties are deemed to have intentionally evaded the usury laws of some other state.

<sup>75</sup> See the last three citations, *supra* n. 72, and *Manufacturers Finance Co. v. B. L. Johnson & Co.* (1931) 15 Tenn. App. 236.

<sup>76</sup> *Townsend v. Riley* (1865) 46 N. H. 300; *Dugan v. Lewis* (1891) 79 Tex. 246; *Smith v. Parsons* (1893) 55 Minn. 520; *Lanier v. Union Mortgage, Banking & Trust Co.* (1897) 64 Ark. 39; *Ashurst v. Ashurst* (1898) 119 Ala. 219; *Midland Savings & Loan Co. v. Solomon* (1905) 71 Kan. 185; *Steinman v. Midland Savings & Loan Co.* (1908) 78 Kan. 479; *Goode v. Colorado Investment Loan Co.* (1911) 16 N. M. 461, 117 Pac. 856; *Le Sueur v. Manufacturers' Finance Co.* (C. C. A. 6th 1922) 285 Fed. 490; *Castleman v. Canal Bank & Trust Co.* (1934) 171 Miss. 291; *Merchants' & Manufacturers' Securities Co. v. Johnson* (C. C. A. 8th 1934) 69 F. (2d) 940, *cert. denied* 293 U. S. 569; *Armstrong v. Alliance Trust Co.* (C. C. A. 5th 1937) 88 F. (2d) 449.

<sup>77</sup> *Midland Savings & Loan Co. v. Solomon* (1905) 71 Kan. 185, 191, 79 Pac. 1077.

In summary, although it remains not quite certain which combination of elements will satisfy a court,<sup>78</sup> it seems that the stipulation is likely to be accepted when it refers to the law of a state in which one of the parties is effectively domiciled and in which at the same time either the contract is deemed to be made, or to be performed, or the land security is situated, or payment is to be made.

Hence, the usury doctrine of the American courts, also in its extension to express agreements on the applicable law, is a remarkable specialty, suggestive of ideas, but by no means susceptible of simple generalizations. It rather demonstrates the usefulness of an elaborate approach to individual problems.

## 2. Insurance Statutes

In "a few instances,"<sup>79</sup> courts of this country have disregarded express contract stipulations determining the place of the contract and thereby the applicable law.<sup>80</sup> It seems that all these decisions were rendered in Massachusetts and Missouri. The latter state has waged a long and gallant legislative

<sup>78</sup> In *U. S. Building & Loan Ass'n v. Lanzarotti* (1929) 47 Ida. 287, 274 Pac. 630, 632, with no express reference to a law, the agreement that the note should be paid in Montana at the domicile of the lending corporation, was rejected as not supported by innocent intent. If facts of the case were better known, the true motive of the court would be clearer.

<sup>79</sup> COUCH, 1 *Cycl. of Insurance Law* (1929) 441. These cases, it seems to me, have impressed BATIFFOL 60 n. 1 by far too much; but, it is true, CARNAHAN, *Conflict of Laws and Life Insurance Contracts* (1942) 95, 562 also voices the impression that choice of the law of the home office of the insurer is ineffectual. Regrettably, he does not substantiate this thesis.

<sup>80</sup> *Massachusetts: Albrow v. Manhattan Life Ins. Co.* (1902) 119 Fed. 629, *aff'd* (1904) 127 Fed. 281; *Dolan v. Mutual Res. Fund Life Ass'n* (1899) 173 Mass. 197, 53 N. E. 398.

*Missouri: Cravens v. New York Life Ins. Co.* (1899) 148 Mo. 583, 50 S. W. 519, *aff'd* (1900) 178 U. S. 389; *Horton v. New York Life Ins. Co.* (1899) 151 Mo. 604, 52 S. W. 356; *Haven v. Home Insurance Co.* (1910) 149 Mo. App. 291, 130 S. W. 73; *Saunders v. Union Central Life Ins. Co.* (Mo. App. 1923) 253 S. W. 177; *Hoffman v. North American Union* (Mo. App. 1933) 56 S. W. (2d) 599; *Ragsdale v. Brotherhood of Railroad Trainmen* (Mo. App. 1934) 80 S. W. (2d) 272.



battle, with repeated reverses in the Supreme Court of the United States, to protect its residents against forfeiture clauses and other contractual deteriorations of their insurance in New York companies.<sup>81</sup> Certainly, if an insurance contract has all the characteristics of a Missouri contract, stipulations inserted in the policy providing, for example, for a different rule of computation from that prescribed by the statute or for waiver of surrender value, forbidden by the statute, would be recognized as ineffectual at present as it was in 1891 with the approval of the Supreme Court of the United States.<sup>82</sup> If in such a case of an insurance contract belonging to the law of one state, the law of another state is stipulated for, it is a question of public policy whether the statutory prohibition should be maintained nevertheless. A court, then, may qualify the agreement as an ineffectual attempt at evasion within the sphere of the prohibition. This, indeed, seems to be the view taken for a long period in Massachusetts in certain cases of violations.<sup>83</sup> The agreement, however, ought not to be considered void as a whole. The Missouri court exaggerated by asserting that the interpretation and effect of the terms of insurance are governed by Missouri law when the contract is deemed to have been made there, despite a clause referring to New York law.<sup>84</sup>

However, the vastly prevailing doctrine respecting insurance contracts is summarized in the leading encyclopedia to

<sup>81</sup> Instructive: Missouri Annotations to the Restatement 142 § 332.

<sup>82</sup> *Equitable Life Assurance Society v. Clements* (1891) 140 U. S. 226. I cannot agree with the conclusion by LORENZEN, 30 Yale L. J. (1921) at 579 n. 73 from this decision that the intention of the parties is not permitted to violate the statutes of the *lex loci contractus*.

<sup>83</sup> *Dolan v. Mutual Reserve Fund Life Ass'n* (1899) 173 Mass. 197, 53 N. E. 398; *Millard v. Brayton* (1901) 177 Mass. 533, 537; 59 N. E. 436.

<sup>84</sup> *Pietri v. Seguenot* (1902) 69 S. W. 1055, 1057. Kerner, J., in *New England Mutual Life Ins. Co. of Boston, Mass. v. Olin* (C. C. A. 7th 1940) 114 F. (2d) 131, 137, despite his similar sweeping dictum in an otherwise correct opinion, certainly wanted to say only that the contract and the agreement involved were made in fact in Indiana, and therefore the nonforfeiture statute of Indiana prevailed over the stipulation for Massachusetts law.

the effect that, "if the policy or certificate does expressly provide that a specific state shall be the place of contract, the law of the state agreed upon as governing controls the nature, validity, interpretation, and effect of the contract, whether the specified state be the state wherein the contract was made, or a foreign state or country and notwithstanding the insured resides, or the property is located, in another state."<sup>85</sup>

This being the settled rule, all justifiable exceptions are fully explained by the operation of a specific public policy, a viewpoint needing separate discussion.

The constitutional limits of public policy to be exercised by a state, have been illustrated in *New York Life Insurance Company v. Dodge*. By a contract undoubtedly made in Missouri, a resident of that state was insured in a New York company. The insured concluded a collateral agreement with the company under the stipulation that the agreement should be deemed to have been made in New York, although most elements of its conclusion pointed to Missouri. The Supreme Court of the United States denied the state of Missouri the constitutional power to enforce its prohibitions against this agreement, thus rejecting the argument sustained by Mr. Justice Brandeis in a dissenting vote that the individual's right created under the Missouri contract was not susceptible of being disposed of by contracting anywhere.<sup>86</sup> However, on

<sup>85</sup> COUCH, 1 Cycl. of Insurance Law 440 § 199; see also Note, 112 A.L.R. 130 and 44 C. J. S. (1945) 516 § 54 n. 86. Cf. Trexler, J., in *Stoddard v. Thomas* (1915) 60 Pa. Super. Ct. 177 at 181 where a stipulation for the law of the domicile of a finance company was invalidated, *supra* n. 74: "No one questions the right of a corporation, such as an insurance company for example, to provide that its policies although issued to a person in another state, shall be governed by the laws of the state of its residence."

It is agreed that where the law of the insurer's domicile is more favorable to the claimant, express provisions in its favor are readily recognized. See, for instance, *CARNAHAN*, *supra* n. 79, 252 n. 85.

<sup>86</sup> *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357, 375 (opinion of the court); 377, 382 (dissenting vote) among other arguments probably not equally prominent in Mr. Justice Brandeis' mind.

this question there is a long line of federal as well as state decisions which it is difficult to reduce to a summary.<sup>87</sup>

In addition, courts have approved the claim of states to govern insurance policies issued to residents by foreign companies licensed to do business in the state.<sup>88</sup> In the case of insurance, indeed, states are entitled to the exercise of greater control, unless new restrictions are to follow from extending the Interstate Commerce Clause of the Constitution to insurance business.

### III. EXEMPTIONS FROM LIABILITY

*Municipal laws and unifications.*<sup>89</sup> While no debtor can effectively stipulate that he should not be responsible for his own fraudulent conduct,<sup>90</sup> gross negligence is treated on the same footing only in part of the legislations. Moreover, many courts traditionally view stipulations lessening the extent of liability with disfavor and construe them punctiliously, although at present in most commercial cases insurance may replace such liability.<sup>91</sup> Finally, in certain cases, liability for lack of ordinary care (negligence, *culpa levis*), either of the debtor himself or also of his agents, may not be contracted out under modern views, the strictest of which are to be found in this country. Thus, in contrast to British and German laws, the Supreme Court of the United States has proclaimed that common carriers by land and sea could not exempt themselves from liability for loss or damage arising from negligence of their servants, "and that any stipulation for such

<sup>87</sup> See CARNAHAN, *supra* n. 79, 71ff., 554, 574-586, 589ff.

<sup>88</sup> *New York Life Ins. Co. v. Cravens* (1900) 178 U. S. 389; *Great Southern Life v. Burwell* (1926) 12 F. (2d) 244, *cert. denied* 271 U. S. 683; *Owen v. Bankers' Life Ins. Co.* (1909) 84 S. C. 253, 255, 66 S. E. 290.

<sup>89</sup> Cf. HOLLÄNDER, 3 *Rechtsvergl. Handwörterbuch* 534.

<sup>90</sup> PAULUS in *Just. Dig.* 2, 14, 27, 3: *Illud nulla pactione effici potest, ne dolus praestetur.*

<sup>91</sup> See a similar observation by GLANVILLE WILLIAMS, 7 *Modern L. Rev.* (1944) 75, 154 commenting on a new English decision.

exemption was void as against public policy."<sup>92</sup> The declared reasons for supporting this thesis were the economic preponderance of big enterprises, not giving customers fair opportunity to bargain for conditions, and the educational purpose of severe rules of behavior.<sup>93</sup> Later, stipulations for foreign laws favorable to the carriers were disregarded, because frequently the party submitting thereto has no actual intention to do so and there is no freedom of contracting.<sup>94</sup> The federal legislation regulating interstate communication and carriage by land and sea was inspired by these views. With respect to maritime affreightment—which has created the outstanding international problem in this field—the Harter Act of 1893 and subsequent congressional acts<sup>95</sup> have established liability of the shipowner for certain occurrences without possibility of exemption, while no liability exists in other cases. Canada, Australia and New Zealand have enacted laws following this model.<sup>96</sup> A variant of the same method was pursued in the Hague Rules of 1921<sup>97</sup> and, on their basis, by the Brussels Convention of 1924, ratified by many states,<sup>98</sup> which has also been incorporated into English and, recently, American

<sup>92</sup> Mr. Justice Gray in *Knott v. Botany Mills* (1900) 179 U. S. 69 at 71; *Clark v. Southern R. Co.* (1918) 69 Ind. App. 697, 119 N. E. 539.

<sup>93</sup> *New York Central R. Co. v. Lockwood* (1873) 17 Wall. 357, 379.

<sup>94</sup> *Oceanic Steam Navigation Co. v. Corcoran* (1925) 9 F. (2d) 724, 727: "The customer cannot afford to higggle or stand out"; *Phillips v. The Energia* (1893) 56 Fed. 124; Note, 54 Harv. L. Rev. (1941) at 668.

<sup>95</sup> Act of Feb. 13, 1893, c. 105, 27 Stat. 445, 46 U. S. C. A. §§ 190-192; Law of Sept. 7, 1916, 39 Stat. 728.

<sup>96</sup> Australia: Sea Carriage of Goods Act, 1904.

Canada: Water Carriage of Goods Act, 1910 (9 & 10 Edw. 7, c. 61).

New Zealand: Sea Carriage of Goods Act, 1908.

<sup>97</sup> Hague Rules of the International Law Association, 1921, see 30th Report (1922) 2, 260.

<sup>98</sup> Convention on the Unification of certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, Brussels, August 25, 1924, HUDSON, 2 Int. Legislation 1344, U. S. Treaty Series No. 931, 51 U. S. Stat. 233, 120 L. of N. Treaty Series 155, 157, 183, ratified by Belgium, Denmark, Finland, France, Great Britain and many British dominions and dependencies, Hungary, Italy, Monaco, the Netherlands, Norway, Poland, Portugal, Rumania, Spain, Sweden, United States. For a full list see KNAUTH, *Ocean Bills of Lading* (ed. 2, 1941) 75-80.

laws.<sup>99</sup> France and Italy diverge only in certain significant particulars.<sup>100</sup>

Land transportation rules of civil law countries have been largely unified by the conventions of Bern on the carriage of goods,<sup>101</sup> and a similar convention on carriage of passengers has been signed.<sup>102</sup> The latest endeavors have been devoted to air transportation, in which field regard for the weak position of private customers has seemed to be counter-balanced by the desire of many states to develop a young and costly industry. Nevertheless, in conventions,<sup>103</sup> numerous laws,<sup>104</sup> and cases,<sup>105</sup> comparative severity has prevailed, although the standard of liability maintained in this country against maritime carriers considerably surpasses the risks imposed on air carriers under the Warsaw Convention.<sup>106</sup>

More isolated legislation in particular countries has dealt with restrictions on liability in employment contracts, agreements of attorneys and notaries, and others. Differences, however, still exist in all fields, some of considerable weight.

<sup>99</sup> E.g., England: Carriage of Goods by Sea Act, 1924.

United States: Carriage of Goods by Sea Act, of April 16, 1936, 49 Stat. 1207-1213, 46 U. S. C. A. §§ 1300-1315.

Canada: Water Carriage of Goods (Hague Rules) Act, 1936.

Australia: Sea Carriage of Goods Act, 1924.

Also the maritime part (Book II) of the Netherlands' Commercial Code, revised in 1924 and 1926, is strongly influenced by the Convention.

German HGB., amended by Law of August 10, 1937, RGBl. I 891.

<sup>100</sup> France: See DEMOGUE, 5 Obligations 462-501; JOSSERAND, Les transports (ed. 2) 609 § 627ff.; ESMEIN in PLANIOL et RIPERT, 6 Traité Pratique 560 § 400ff.; DANJON, 2 Droit Marit. § 845ff.; RIPERT, 2 Droit Marit. § 1737ff.

Italy: The principles concerning maritime affreightment have been summarized in Cass. (Feb. 27, 1936) Foro Ital. 1936.1.297, 35 Revue Dor (1937) 291.

<sup>101</sup> Convention on the Transport of Goods by Rail, of Oct. 23, 1924, arts. 26-39, MARTENS, Recueil, XIX, 3d Series, 476.

<sup>102</sup> Convention on the Transport of Passengers and Luggage, of Oct. 23, 1924, arts. 28-39, *id.* 558.

<sup>103</sup> Convention of Warsaw for the Unification of Certain Rules regarding International Air Transport, of Oct. 12, 1929, HUDSON, 5 Int. Legislation 100.

<sup>104</sup> ALLEN, "Limitation of Liability to Passengers by Air Carriers," 2 Journal of Air Law (1931) 325.

<sup>105</sup> For the United States, see Note, 54 Harv. L. Rev. (1941) at 666.

<sup>106</sup> ROBINSON, Admiralty 560.

To appreciate the varieties and the merit of the unifications obtained, the background of policy must be remembered. The variety of maritime liability has now largely been ended by successful unification, but forms a memorable chapter of history. Shipping in England and Germany and marine insurance in England have had an eminent function in the public economy; it was often thought a national interest to maintain their power of competition at low rates, whereas affreighters and passengers were supposed to cover their risks by insurance. In the authoritative French opinion, efficient prohibitions on exemption clauses have always been believed impossible except by international convention, lest French shipping be sacrificed to foreign competition.<sup>107</sup> Also, the various rules of liability and nonliability combined by the Harter Act, though largely influenced by the desire to protect American cargo shipping which at that time was mostly carried on foreign lines, were also designed to facilitate the carrying trade in order to aid incipient American shipping competition with foreign rivals. Certain liabilities of the general maritime law were considerably lessened and the bargaining position of the American companies was improved by imposing the same conditions on foreign vessels leaving, or even headed for, American ports. These circumstances influenced a series of conflicts cases, which have remained the leading cases on the entire matter in discussion, although the domain of possible conflicts of laws in sea carriage of goods is greatly narrowed at present. We must therefore concentrate on this classic topic.

*Conflicts law.*<sup>108</sup> There is no doubt about the principle that the law governing a contract also determines the permissibility of agreements releasing or restricting the obligor's

<sup>107</sup> See RIPERT, 2 *Droit Marit.* 761, 773.

<sup>108</sup> On the American interstate conflicts remaining since the federal enactments, see Note, "Limitations of Carriers' Liability and the Conflict of Laws," 54 *Harv. L. Rev.* (1941) 663.

liability, even though this law may be called for by another stipulation.<sup>109</sup> With regard to carriage of goods by sea, this has been recognized not only in the English,<sup>110</sup> German,<sup>111</sup> and Italian courts,<sup>112</sup> but also in the United States.<sup>113</sup> Where an English vessel takes on a cargo in Liverpool for transportation to Cuba, both the stipulations referring to English law and exempting the shipowner from liability for negligence of the mate, have been held valid.<sup>114</sup>

Conflicts arise, of course, when a vessel sails from Liverpool to Baltimore; the English courts definitely claim that its contracts of transportation are determined by English law,<sup>115</sup> while the American courts since the Harter Act subject it to American law.<sup>116</sup> Other conflicts are caused by the abstention of the Brussels Convention from regulating transportations agreed upon without issuing a bill of lading and from including the periods of time before the goods are loaded on and after they are discharged from the ship (art. 1 b and e); and particular divergences arise out of the unregulated methods of implementing the Convention, which may be

<sup>109</sup> *Atchison, Topeka & Santa Fe R. Co. v. Smith* (1913) 38 Okla. 157, 132 Pac. 494 should not be excepted; the decision validates a waiver of liability printed on the back of a free railway pass, in application of the law of the forum deemed to be the law of the place of performance, although favor for the law more favorable to the stipulation (i.e., the waiver) is also expressed.

<sup>110</sup> *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321.

<sup>111</sup> RG. (May 25, 1889) 25 RGZ. 104, 107; (Jan. 2, 1911) 75 RGZ. 95.

<sup>112</sup> Italy: App. Venezia (March 1, 1935) *Schiaffino v. Capano*, 112 Foro Ital. Rep. 1935, 1363 ns. 43-46; Giur. Ital. Rep. 1935, 601 ns. 4-7, applying English Carriage of Goods by Sea Act, 1924, manifestly upon reference to English law.

<sup>113</sup> *Liverpool and Great Western Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397 (American law applied on the ground of presumed intention); *The Oranmore* (D. C. D. Md. 1885) 24 Fed. 922, *aff'd*, 92 Fed. 396 (stipulations of English law and exemption valid).

<sup>114</sup> *The Miguel di Larrinaga* (D. C. S. D. N. Y. 1914) 217 Fed. 678 (English law stipulated, English vessel from Liverpool to Cuba); and see Note, 35 Yale L. J. (1926) 997.

<sup>115</sup> *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321, 330, *cf.* DICEY 650 n. (m).

<sup>116</sup> *Liverpool and Great Western Steam Co. v. Phoenix Ins. Co.* (1889) 129 U. S. 397; Carriage of Goods by Sea Act, 1936, § 13.

done by ratifying and sanctioning it as a whole, or by ratifying it and reproducing it more or less exactly in separate laws (Protocol of Signature, par. 2), or else by adopting a part of it in an independent law.<sup>117</sup>

The only problem, however, presenting itself at this juncture, concerns the nonapplication of an exemption clause stipulated under a law selected by the parties. Decisions denying effect to such clauses must be regarded as exceptions to the rule and need justification by strong public policy on the ground of a sufficiently close relation of the case with the territory of this policy. In fact, the laws and courts are far from giving an exclusive role to the *lex loci contractus*.

Dealing with the Harter Act, the American courts have interpreted the Act as including, in all its provisions, foreign vessels<sup>118</sup> leaving or arriving<sup>119</sup> in American ports. In all these cases, a clause of exemption contrary to the Act is invalid, although it may be valid under the law of the place where the contract is made or the law agreed upon.<sup>120</sup> This has been laid down very distinctly in section 13 of the Carriage of Goods by Sea Act, 1936. Dutch law prescribes, likewise, that reference to foreign law is not generally able to restrict liability of shipowners, but recognizes stipulations if valid by the law of the place where the goods are loaded,<sup>121</sup> at least in the case of foreign vessels.<sup>122</sup> Argentina, Brazil,

<sup>117</sup> This fact has been deplored by Bateson, J., in *The St. Joseph* [1933] P. 119, 134. The divergences of the French Law of April 2, 1936 from the Brussels Convention (ratified by France according to the Law of April 9, 1936 by Decree of the President of March 25, 1937) are reviewed in the Note, S.1936.5.165ff.

<sup>118</sup> *The Silvia* (1898) 171 U. S. 462; *The Chattahoochee* (1899) 173 U. S. 540, 550.

<sup>119</sup> *Knott v. Botany Mills* (1900) 179 U. S. 69.

To an analogous effect, Belgium: C. Com. art. 91 as amended by Law of Nov. 28, 1928, art. 1, discussed in *The St. Joseph* [1933] P. 119, 121.

<sup>120</sup> *Knott v. Botany Mills*, *supra* n. 119.

<sup>121</sup> *The Netherlands*: C. Com. (1838) arts. 470, 470a, 517d, *cf.* 520t.

<sup>122</sup> *Rb. Rotterdam* (June 15, 1938) W. 1939, 617 restricts art. 517d to foreign vessels.



and Chile, as well as the former Italian Commercial Code according to a certain interpretation, have declared imperative the force of their rules concerning affreightment upon foreign vessels if (or insofar as) the contract is to be performed in the country.<sup>123</sup> These are outstanding examples of the most extended policy which evidently governs the exception to the conflicts rule on affreightment and not the rule itself.

The American courts have never doubted, before and after the Harter Act came into being, that they applied it compulsorily on the ground of public policy, not on account of some obscure dogma. The acts declaring exemptions from liability to passengers invalid expressly impose the prohibition as public policy. Of course, the Supreme Court has construed an affreightment made in the United States on an English vessel for a journey from an American port to England as an American contract so as to apply the Harter Act as a part of the governing law rather than to restrict the governing English law by an exception of American public policy. But this was expressly done, "unless the parties (to the contract) at the time of making it have some other law in view."<sup>124</sup> The principle, until recently, appeared well settled that there had to be a particular interest of the United States, if American public policy should be invoked against a foreign law governing the contract.<sup>125</sup>

A divergent conception, however, was developed in matters

<sup>123</sup> Argentina: C. Com. art. 1091.

Brazil: C. Com. art. 628 (these both speaking of contracts wherever stipulated but performable in the country).

Chile: C. Com. art. 975 par. 2 (speaking of the part of the contract concerning discharge of the vessel or other act to be made in the country).

Italy: Cass. (Oct. 15, 1929) Riv. Dir. Com. 1930 II 529; SCERNI 223 n. 2; but the intention of the parties has been considered in App. Venezia (Jan. 22, 1931), The "Stylianor," cited and criticized by SCERNI 217.

<sup>124</sup> Liverpool and Great Western Steam Co. v. Phenix Ins. Co. (1889) 129 U. S. 397, 458ff.

<sup>125</sup> Distinctly to this effect, The Fri (C. C. A. 2d 1907) 154 Fed. 333: exemption clause under the stipulated law of Colombia for transportation from Carthagen to Cienfuegos valid.

not covered by the Harter Act in the New York federal and state courts. It started in a case<sup>126</sup> where the British White Star Line contracted with American excursionists who were represented by a tourist agency in Boston for passage from Montreal to Liverpool. The contract expressly referred to English law and required the passengers in case of injury to give notice to the company within three days after landing. On the journey to England, a school teacher from Indiana was grievously hurt by inexcusable negligence of a steward and, after landing, was brought from the ship's hospital to a hospital in Liverpool where she had to stay for months. To the claim for £50,000 damages, the line defended on the ground of omission of notice. The New York court, comparing the American law which would grant a reasonable time for giving such notice<sup>127</sup> with English law allowing a shorter time to be fixed, found the former applicable by public policy against the expressed intention of the parties. The argument, in the words of Judge Rogers was that "the contract of exemption, being made in the United States, was void by the law of the place where it was made." Hence, even a Canadian travelling from Canada to England, would be protected by American law, if he contracts through an American agency. This extension of public policy, in the clothes of *lex loci contractus*, has been authoritatively criticized as extravagant.<sup>128</sup> Evidently, reasons of fairness prompted the result which the court seemingly felt unable to sustain otherwise, viz., by a restrictive construction of the clause. It would make

<sup>126</sup> *Oceanic Steam Navigation Co. v. Corcoran* (C. C. A. 2d 1925) 9 F. (2d) 724.

<sup>127</sup> *The Kensington* (1901) 183 U. S. 263.

<sup>128</sup> COOK, *Legal Bases* 408; see also Notes, 35 *Yale L. J.* (1926) 997; 10 *Minn. L. Rev.* (1926) 530. To the contrary, ROBINSON, *Admiralty* 559 asserts that the contract would be void under the federal statute of June 5, 1936, c. 521 § 2, 46 U. S. C. § 183 c; but since this statute is also limited to vessels from and to ports of the United States, I cannot see the basis of this assertion.

sense to dispense with formal notice of claim to the ship company in the case of a passenger treated by the ship's physician and brought ashore on a stretcher to a hospital by the crew. But also the recent federal legislation maintains formality in this respect.

However, the New York Court of Appeals has continued its way. In 1930 Judge Learned Hand in a dictum confirmed that the *lex loci contractus* governs a contract of carriage even though the parties expressly stipulate for another law.<sup>129</sup> In another case<sup>130</sup> dealing with no personal injury at all, but involving a cargo of silk, the shipowner was declared liable for loss from theft, despite a stipulation to the contrary and submission to British law in the bill of lading, and although the bill was issued in Shanghai, British Crown Colony, for carriage to Vancouver, British Columbia, and the theft in question occurred on this stage of the voyage. The only contacts with the forum were the facts that the bill of lading covered also the railroad transportation from Vancouver to New York and that the destination was a firm in New York. The court knew that no federal policy applied; it developed state policy of an intransigent character. Further, the exemption clause in a passenger transportation by airplane was invalidated under New York law because of booking and beginning of the transport at the airport of Albany, New York.<sup>131</sup> A federal district court in New York has finally concluded that release of a common carrier from liability for his own negligence is held illegal and void in New York, evidently under all circumstances.<sup>132</sup> In this case, indeed, the passenger's ticket was is-

<sup>129</sup> *Louis-Dreyfus et al. v. Paterson Steamships, Ltd.* (1930) 43 F. (2d) 824, 826.

<sup>130</sup> *F. A. Straus & Co., Inc. v. Canadian Pacific R. Co.* (1930) 254 N. Y. 407, 173 N. E. 564; criticized in Notes, 31 Col. L. Rev. (1931) 495; 79 U. of Pa. L. Rev. (1931) 635.

<sup>131</sup> *Conklin v. Canadian-Colonial Airways, Inc.* (1935) 266 N. Y. 244, 194 N. E. 692.

<sup>132</sup> *Barndt v. Det Bergenske Dampskibsselskab, The Venus* (1938) 28 F. Supp. 815, 1939 Am. Marit. Cas. 1564.

sued in the state, but the journey was to be made between Bergen, Norway, and Newcastle, England, and Norwegian law was stipulated. That the court, in addition, resorted to admiralty law, supposedly overruling the stipulation for another law, is another ground for astonishment.

It is difficult to reconcile this chain of cases with otherwise established rules. It approaches rather closely such fighting radicalism as is shown in the Italian Aviation Law, of August 20, 1923, declaring all clauses of exemption void irrespective of the law governing the contract. Opposing doctrines prevail. For instance, the Dutch Supreme Court has recognized an exemption clause regarding an air flight of a Dutchman from the airport in Bangkok on a plane of the Royal Dutch Aviation, valid under Siamese law but contrary to Dutch;<sup>133</sup> the Canadian courts conceive that prohibitions of waiver of liability by the Railway Act of Canada are inapplicable so soon as the transport leaves the Canadian border,<sup>134</sup> and so forth.

*Extraterritorial effect.* The Harter Act has been regularly applied abroad, if the contract of affreightment was considered governed by American law or when reference to it was inserted by the very wide use of an appropriated clause.<sup>135</sup> In the latter case only, restrictions to its application may re-

<sup>133</sup> The Netherlands: H. R. (March 18, 1938) W. 1939 No. 69 with a critical note by Meyers approving of the decision on other grounds.

<sup>134</sup> Ontario: McDonald v. Grand Trunk R. Co. (1896) 31 O. R. 663.

<sup>135</sup> England: Dobell & Co. v. Rossmore S. S. Co. [1895] 2 Q. B. 408 (C. A.); Rowson v. Atlantic Transport Co. [1903] 2 K. B. 666 (C. A.).

Canada: Jas. Richardson & Sons v. The Burlington [1931] S. C. R. 76: American ship from American port to Canadian port, with a clause of exemption held to be visibly inspired by the Harter Act.

Argentina: Pratt y Cía. v. Munson Steamship Line (Cám. Fed., Oct. 20, 1922) 9 Jur. Arg. 523 and other decisions, cited and criticized because of wrong application of the Act, by DE LAS VEGAS, Note, 75 Jur. Arg. (1941) 233, 234.

France: App. Rouen (July 31, 1895) Clunet 1895, 1088; Cass. (civ.) (Dec. 5, 1910) S.1911.1.129, Clunet 1912, 1156, Revue 1911, 395 (express stipulation for American law recognized although with restriction by exemption clause); Cass. (req.) (Nov. 12, 1918) S.1920.1.29 with note listing many

sult from added clauses of exemptions, earlier discussed.<sup>136</sup>

The same treatment has been given to the Australian Act of 1904<sup>137</sup> and the Dutch Maritime Law.<sup>138</sup>

*International needs.* In such important international matters as the Hague Rules, a normal international situation would be guaranteed, if the peculiar public policy of each state were limited to certain cases. For example, in the majority of countries prohibitions on exemptions in maritime affreightment are imperatively imposed only on vessels loading the goods in a port of the prohibiting country, or, as it is usually put, issuing the bill of lading in such a port. Economically or politically justifiable extensions such as the American application of the domestic law to vessels arriving in American ports, are at least neat enough to be taken account of in contracts. A vessel travelling from Pernambuco to New York may adjust its bills of lading to both laws. But such practice as that of the New York courts is exorbitant when it insists on protecting all residents, or all persons booking in the state, wherever the journey begins

other cases. See also on the clause: "weight unknown," RIPERT, 2 *Droit Marit.* 735 § 1782.

Germany: OLG. Hamburg in 20 *Hans. GZ.* (1899) HBL. 122; 26 *id.* (1905) HBL. 227, 270; 28 *id.* (1907) HBL. 244; *cf.* RG. (Sept. 24, 1930) *Hans. RGZ.* 1930 B 707.

The contract being considered governed by German law, the Harter Act was rejected: RG. (May 25, 1889) 25 *RGZ.* 104, 107.

Egypt: App. Mixte Alexandria (Jan. 25, 1939) 40 *Revue Dor* (1939) 231 (goods shipped from San Francisco; insurance clause invalid under Harter Act).

<sup>136</sup> *Supra* pp. 388 ff.

<sup>137</sup> Germany: OLG. Hamburg (March 17, 1913) 24 *Hans. GZ.* (1913) HBL. 157 No. 74, *aff'd*, RG. (Jan. 28, 1914) *Hans. GZ.* (1914) HBL. 108 No. 52.

The Netherlands: Rb. Rotterdam (Dec. 15, 1926) W. 12048, 21 *Revue Dor* 447 (Australian Act of 1904 declared to have been agreed upon with force against the special clauses for exemption!).

<sup>138</sup> England: *The Roberta* [1937] 58 *Ll. L. Rep.* 159; [1938] 60 *id.* 84 (implicitly).

Germany: OLG. Hamburg (Feb. 12, 1936) *Hans. RGZ.* (1936) B 243 No. 76.

and ends. If other countries were to reciprocate this claim, there would be chaos again. On the other hand, the English courts are generally believed to be too much inclined to accept a reference to English law, irrespective of geography. The *Vita Food's* case has given new force to this reputation inasmuch as an exemption under English law prevailed in the court, although the vessel departed from Newfoundland to the United States. However, in this case the material point was simply whether the omission of the "clause paramount" nullified the bill of lading—which question was negatived primarily under English and, more cautiously, under Newfoundland law—whereas the exemption clause itself was as good under the Hague Rules adopted in Newfoundland as under those adopted in England. Hence, at least, the Privy Council did not detract from the internationally acquired ground of the Hague Rules. These are the painfully won result of long negotiations among ship-owners, affreighters, maritime agents, exporters, and insurers of the greater part of the world. The compromise was so delicate that the legal experts at the Brussels Conference did not dare to reform the naïve drafting, and that opposition is still flaring in some quarters. It would be irresponsible for any court even of countries not participating in the Convention to jeopardize its operation by a unilateral public policy applied to vessels on foreign voyages. The more so should courts of member states recognize the prohibitions prevailing at the place where the bill of lading is issued irrespective of the distinction whether the Hague Rules are adopted at this place by ratification or only by independent enactment.<sup>139</sup>

Similar considerations may come to the rescue of the much criticised decision of the English Court of Appeals in *The*

<sup>139</sup> Such a distinction is made, however, by KNAUTH, *The American Law of Ocean Bills of Lading* (ed. 2, 1941) 120 probably on the ground of a literal interpretation of art. 10 of the Brussels Convention.

*Torni*.<sup>140</sup> The vessel carried oranges from Jaffa in Palestine to Hull in England. The Palestine Ordinance, which had adopted the Hague Rules was concerned with bills of lading issued in Palestine, while the analogous British statute was confined to bills of lading issued in Britain. By stipulating for English law, the bill of lading issued in Palestine consequently would have allowed clauses of exemption prohibited by the Hague Rules, despite both laws adopting them. The court acted wisely in depriving this stipulation of such force. The technical arguments of the judges, it is true, are easily challenged. The presumptive intention of the parties was a weak support; general recognition of any illegality provided by the *lex loci contractus* is untenable; and a bill of lading is not void, without an express and inadvisable legal sanction, solely because the "paramount" clause is omitted. But regard for the law of a friendly nation may very well prevail precisely in this subject.

#### IV. CONCLUSIONS

Contrary to many assertions, the leading conflicts laws do not recognize any imperative rules governing a priori (*supra* I, 1). Equally, the often repeated general postulate that the parties can select a law only if it has a substantial connection with the contract, has proved a fallacious idea (*supra* I, 3). It is true, the use of this idea in more recent American usury cases has produced a unique and specially elaborated compromise among the regulations of interest on loans in the various sister states (*supra* II, 1). This may well serve as a model to solve other particular conflicts, restricting rather than freely allowing the public policy of the forum in its opposition to a stipulated foreign law. However, a general rule confining the choice of law by the parties to a certain number of legislations is impracticable; the transfer

<sup>140</sup> [1932] P. 27, 37; 78, 83ff.; see *supra* ns. 23, 24.

of the American interstate policy in usury cases into the field of international commerce would be disastrous.

In a somewhat different manner, also the American cases concerned with insurance contracts testify to a struggle between the clauses for application of foreign law and public policy of the forum. Here, outstanding local interests in protecting citizens and supervising intrastate business have found a basis in the constitutional decisions of the Supreme Court (*supra* II, 2). The last word has not been spoken, however, and general inferences drawn from this delicate subject would be highly adventurous.

The important topic of exemptions from liability shows another similar strife (*supra* III). If it is borne in mind that any resort to domestic prohibitions must be justified by stringent public policy claiming to dominate the contract, courts will refrain from imposing the policy of their states upon prevailingly foreign relations. On the other hand, international commerce should be restricted as well as protected by common compromise rather than one-sided dictates.

Excluding the dubious exception of public policy, there is only one tangible leading idea emerging from the manifold confused attempts to restrict party autonomy. This is the desire to obviate *evasion* of law. But we have found merely one situation in which in the universal opinion a law is not permitted to be avoided, that is, when a contract by *all* (not only by some) substantial connections belongs to one sole jurisdiction and, thus, is devoid of *all* considerable foreign elements. The claim of any state exclusively to govern contracts entirely radicated in its territory is well enough founded to justify its recognition by all other states.

While in the case just mentioned the parties are precluded from selecting a foreign law against imperative domestic rules on an objective basis, the theory of *fraus legis* disapproves always and only the evident purpose of



evasion in an agreement. The French and also some American courts are inclined to favor this idea. It is well known how difficult is the proof that the main purpose of an obligatory agreement was intentionally to avoid the application of a law. On the other hand, what may be regarded as evasion from the angle of one country, may be recognized elsewhere as legitimate resort to another law, particularly in the state whose law is adopted. If a contract has more than one territorial connection, there is no reasonable background for its compulsory attribution to one state just because this state is hostile to the contract and the parties feared frustration by its law.

The entire problem, therefore, reduces itself to two questions involving contracts with multiple local connections.

First, what is the public policy on the ground of which courts may react against the choice of a foreign law?

Second, under what conditions should the overriding policy of one state be recognized by the others?

While public policy as a unilateral means of barring the play of conflicts rules is an old subject of discussion, the mutual respect for internationally significant policies is in its very first development.

Deferring both questions to the following chapters, we may conclude by urging that party autonomy should not be wantonly discarded for the sake of local policies. A minimum requirement for any court should be a solicitous analysis of the extraterritorial value of state policy in relation to interstate and international needs. Never should it be forgotten that party autonomy is the least dangerous method of bringing certainty into the agitated problems of international private law, and thus, helps to produce that "swift and certain rule"<sup>141</sup> so important to merchants.

<sup>141</sup> Celebrated words, see the citations by HIRAM THOMAS, "The Federal Sales Bill etc.," in 26 Va. L. Rev. (1940) 542.

## CHAPTER 30

# Rules in Absence of Party Agreement

### A. JUDICIAL CHOICE OF LAW

#### I. INDIVIDUALIZED CHOICE OF LAW

##### I. Presumed Intention of the Parties

ACCORDING to their basic proper law theory, English courts, in the absence of an agreement of the parties, will analyze the stipulations and circumstances of a contract, to ascertain the law the parties had "in mind," "in view," "in contemplation," "upon which they acted." This method taken at its face value presupposes that there was a certain law in the background of the negotiations, although the parties did not even tacitly adopt it. Such things happen. When, for instance, an irrevocable power of attorney was declared to be granted in a document executed in New York, by a resident to another resident, for the purpose of cashing the debt of a German debtor, the natural assumption was that New York law should determine whether the power could be revoked, although as a rule authority of an agent is governed by the law of the place where he acts.<sup>1</sup> The intention presumed here is implied rather than merely supposed and may be closely associated to the cases of agreement by conduct.<sup>2</sup>

Usually, however, the parties do not even realize that there may be a question of the applicable law. In this vast majority of cases, the task of the courts is more adequately defined by the question which law the parties probably would

<sup>1</sup> German RG. (Oct. 24, 1892) 30 RGZ. 122; see RABEL, 7 Zausl.PR. (1934) 807.

<sup>2</sup> Cf. loan debentures of New York banks, see *supra* p. 367.

have chosen if they had been conscious of the conflicts problem—their so-called “*hypothetical intention*,” formulated as:

“The intention which would have been formed by sensible persons in the position of X and A if their attention had been directed to contingencies which escaped their notice” (Dicey);<sup>3</sup>

“What the parties would have determined in reasonable and fair consideration of all circumstances” (the German Reichsgericht);<sup>4</sup>

“The law which the parties reasonably could and should have expected to be applied”;<sup>5</sup> or “the law which the parties would have declared applicable if they had thought at all of stipulating on the question” (the Swiss Federal Tribunal);<sup>6</sup>

The law upon which the parties “might be supposed instinctively to rely,” the variant of a judge of the High Court of Australia, aptly explaining the net result of the English rule.<sup>7</sup>

This has been the usual approach of all European courts during the last century, and in part until today.

The inquiry of the court, thus postulated, is essentially concerned with each individual contract. The choice of law is “a matter of construction of the contract itself, as read by the light of the subject matter and of the surrounding circumstances.”<sup>8</sup> It is true that certain types of circumstances have acquired traditional weight. The writers have dedi-

<sup>3</sup> DICEY 666.

<sup>4</sup> RG. (Dec. 13, 1929) 126 RGZ. 196, 206.

Similarly, the Dutch courts, looking for the law agreeable to the supposed fair intention of the parties, see VAN HASSELT 175.

<sup>5</sup> BG. (Sept. 18, 1934) 60 BGE. II 294, 300; see also (Dec. 13, 1932) 58 BGE. II at 435 citing previous cases; (June 19, 1935) 61 BGE. II at 182.

<sup>6</sup> BG. (March 2, 1937) 63 BGE. II 42, 43; (May 26, 1936) 62 BGE. II 140, 142 and cited precedents.

<sup>7</sup> McClelland v. Trustees Executors and Agency Co., Ltd. (1936) per Dixon, J., 55 Commw. L. R. 483, 493; 42 The Argus Law Reports 405, 409.

<sup>8</sup> Bowen, J., in Jacobs, Marcus & Co. v. The Crédit Lyonnais (1884) 12 Q. B. D. 589, 600.

cated great care to gathering and analyzing these "indicia" of the supposed will, and to classifying their significance. Most elaborate is the list recently given by Batiffol with regard to the United States, England, France, and Germany.<sup>9</sup> The criteria include domicil and, in Europe, the nationality of any party; the situation of an immovable or enterprise; the currency of a money debt; use of a standard form or a public office; the language; reference to a law or terms of a legal system; the domicil of the party who had the contract or form drafted; the situation of collateral guarantees; submission to arbitration or jurisdiction (where this is not considered equivalent to an express agreement); the conduct of the parties after contracting and in pleading. None of these single instances is conclusive by itself,<sup>10</sup> and there is in reality no effective difference of rank among them; any one may prove decisive.

Instead of going into the debatable details of the list, we may illustrate the method by the arguments of outstanding courts in a few cases representing what has been called accumulation of contact points.<sup>11</sup>

The Supreme Court of the United States in a case deemed to be fundamental, considered the facts of a carrier's contract as follows: "The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped 'in and upon the steamship called Montana, now lying in the port of New York and bound for the port of Liverpool,' and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: 'Guion Line.

<sup>9</sup> BATIFFOL 69-154.

<sup>10</sup> DICEY 648 n. (f).

<sup>11</sup> HARPER and TAINTOR, Cases 175.

United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St.' No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, 'to tranship the goods by any other steamer,' would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but 'according to York-Antwerp rules,' which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.) Appendix Q.

"The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage."<sup>12</sup>

High Court, Chancery Division, *South African Breweries, Ltd. v. King* [1899] 2 Ch. 173, 177, per Kekewich, J. The contract of employment was executed and intended, though not exclusively, to be performed in the South African Republic. "That, however, is not all. Many other considerations require attention." The defendant, an Englishman, had been and was residing in Johannesburg, and intended it to be his place of business, and therefore of residence. The successive

<sup>12</sup> *Liverpool and Great Western Steam Co. v. Phenix Ins. Co.* (1888) 129 U. S. 397, 458; see also *Pritchard v. Norton* (1882) 106 U. S. 124; *Grand v. Livingston* (1896) 38 N. Y. Supp. 490, *aff'd* (1899) 158 N. Y. 688, 53 N. E. 1125.

employers of the defendant were English companies, resident in England. Nevertheless, "it is not according to sound ideas of business, convenience, or sense to say that a company having a registered office with directors and secretary in England, not, however, otherwise carrying on business here, but carrying on business in South Africa, must be treated as resident in England for the purpose of ascertaining whether a contract entered into by them respecting their business in South Africa was intended to be governed by English law or the local law of that part of South Africa. . . . The stipulation in question (restricting the defendant's business engagements on the termination of the contract) has reference to South Africa and not to England, where the defendant is free to carry on business as he pleases. . . . This contract was not intended to be governed and is not governed by English law." Affirmed [1900] 1 Ch. 273, 275, per Lindley, M.R.: It is doubtful whether the defendant had to act as brewer and conduct his business in Natal or elsewhere in South Africa besides Johannesburg. "However, be that as it may, Johannesburg is the primary place to which this contract refers. . . . That being so, and having regard to the fact that the defendant was settled there at the time and that this contract was entered into between him at Johannesburg and the company's representative at Johannesburg, I think that clause 8 (the stipulation in question) cannot possibly be independent of the Transvaal Law."

German Supreme Court (October 29, 1927) 118 RGZ. 282, IPRspr. 1928 No. 60. The author of a play, the composer of the music and the writer of the stage direction, all conveyed their copyrights to an editor in Stuttgart, Germany. All three at the time of the contract clearly were domiciled in Vienna, where they had also to perform their own contractual obligations according to the purpose and nature of the latter, and all arising legal disputes had to be decided by the Viennese court. But the documents of the contract showed only Stuttgart as the place of making, which was also the domicil of the publisher, and the only place of his performance. The royalties due to the authors are all expressed in German currency. It is of particular weight that in the present lawsuit both parties from the outset,

without expressing any doubt, invoked German law and presently discussed the provisions of the German law on literary property. Pondering these grounds of doubt results in the assumption that the application of German law agrees with the presumable intention of the parties to the contract; it would be, in addition, the appropriate choice of law, if the arguments pro and contra completely balanced each other.<sup>13</sup>

Swiss Federal Tribunal (September 23, 1941) 67 BGE. II 215. By an agreement with a New York bank, heading a New York syndicate, the defendant Hungarian bank guaranteed that a certain credit granted by the syndicate to a firm in Budapest would be repaid. The Federal Tribunal declared the law of New York to be exclusively applicable, on the following argument. As the Hungarian bank received a commission, no emphasis is to be placed on the domicile of the promisor as would be done in case of a surety. By assuming a share in the risk of the transaction, the defendant entered into close association with the New York syndicate. The presumption is strong that the parties, and particularly the bank leading the syndicate, intended to subject all internal relations to one uniform law rather than to the different laws of the various domicils of the participant firms. Such a consideration must have seemed only natural to the defendant, an expert participant in international credit business. Furthermore, the contract of guaranty is written in English. The place of performance for the defendant's obligation is New York, since the debtor had to pay in New York, and so had the guarantor. Finally the money sums, throughout the transaction, are expressed in United States dollars.<sup>14</sup>

Courts in most other countries use the same method.<sup>15</sup>

<sup>13</sup> See also e.g., 68 RGZ. 205; 73 *id.* 388; 120 *id.* 72; 126 *id.* 206. The individual decision in 118 RGZ. 282 has been criticized by 2 FRANKENSTEIN 176 n. 179, and BATIFFOL 183 n. 2.

<sup>14</sup> See also 61 BGE. II 182.

<sup>15</sup> See for Belgium: App. Liège (June 21, 1905) S.1907.4.21, 23.

France: Cass. (civ.) (Dec. 5, 1910) S.1911.1.129, Clunet 1912, 1156; (May 31, 1932) D.1933.1.169; (May 15, 1935) Nouv. Revue 1935, 341; Cass. (req.) (Nov. 2, 1937) Nouv. Revue 1937, 766.

The Netherlands: Kg. Amsterdam (Oct. 19, 1915) W. 9937; Hof den Haag (Dec. 10, 1920) N. J. (1921) 1089.

## 2. "Objective" Theory

In most contracts, there is no agreement of the parties on choice of law. Insofar, in fact, "intention is a misnomer."<sup>16</sup> As the Supreme Court of Minnesota, which has repeatedly professed its inclination to follow the law intended by the parties,<sup>17</sup> has stated:

"In a search for the actual intent of the parties when none is expressed, there is an element of legal jugglery. Usually parties to transactions . . . , referable to one state or another, or in part to one state and in part to another, have no unexpressed but actual intent as to the law which shall control. The question of what law governs does not suggest itself to them."<sup>18</sup>

What courts in reality look for, is a suitable local connection of the contract with a country. Presumed intention is no actual intention. Westlake has contributed much to this view by advocating that a contract should be governed by the law with which it has the most real connection.<sup>19</sup> However, the contrast between this objective and the subjective method should not be exaggerated. Also, the inquiry required by both opinions follows strikingly similar methods, though the objective approach does not purport to read the minds of the parties on "contingencies which escaped their notice,"<sup>20</sup> but seeks the law suitable to their stipulations. The above examples of reasoning may be read without any substantial change also in this sense.

The German Reichsgericht has sometimes consciously lent the "objective" approach its proper color by using the

<sup>16</sup> STUMBERG 211 n. 49.

<sup>17</sup> Thomson-Houston Electric Co. v. Palmer (1893) 52 Minn. 174, 53 N. W. 1137; cf. MCCLINTOCK, 10 Minn. L. Rev. (1926) 498 at 503.

<sup>18</sup> Green v. Northwestern Trust Co. (1914) 128 Minn. 30, 36, 150 N. W.

229, 231.

<sup>19</sup> WESTLAKE § 212.

<sup>20</sup> DICEY 666.



term familiar to German jurisprudence, "suppletive construction" of the contract, which is approximately the same as the method of implying stipulations.<sup>21</sup> While pure "interpretation" attempts to discover the true meaning of an existing declaration, constructive analysis may add by implication to an incomplete declaration what the parties would or should have agreed, being honest and prudent people, or what an ordinarily prudent man would have declared upon reasonable and fair consideration of all circumstances.

### 3. Rationale

Although at present the literature seems to prefer the "objective" approach, a distinguished author<sup>22</sup> defends the subjective formulation because of its suggestive power; it reminds the judge that he should distinctly envisage the two concrete persons at the time of contracting. No doubt also American courts by visualizing the parties and their situation, are aided in the effort to overcome stereotyped rules such as that of the *lex loci contractus*. Other writers, however, have pointed to the danger of judges disregarding, in a strained search for individual mentalities, the type of the contract so important in the eyes of businessmen.<sup>23</sup>

We may set aside such imponderables and also disregard positive legal complications, such as those occurring when in Germany the Supreme Court reviews a statement by the lower court of an objective rule but not of a presumed intention because the latter is a mere fact.<sup>24</sup>

What it means that the parties "contemplated" a certain law in making the contract, should not be difficult to under-

<sup>21</sup> RG. (July 5, 1910) 74 RGZ. 171, 174. Suppletive construction of a contract should serve to fill a gap in the contract, not to enlarge the scope of the contract, 87 RGZ. 211; 136 *id.* 176, 185; 160 *id.* 187.

<sup>22</sup> M. WOLFF, IPR. 89. See also HAUDEK 106.

<sup>23</sup> RAAPE, D. IPR. 258.

<sup>24</sup> RG. (Jan. 27, 1928) 120 RGZ. 71, 73; MELCHIOR 513.

stand, as parallels are numerous. Anglo-American common law makes the seller of goods liable for "special" damage caused by his failure to perform, to the extent that the parties "contemplated" or could foresee the circumstances causing the damage. The seller has to compensate the buyer's loss of gain by resale, if resale was contemplated in contracting, that is, if both parties would have affirmed this liability, had they been asked during negotiations. The pertinent question in such a case is whether, at the time of the making of the contract, it must have been in the contemplation of the parties that the goods contracted for might be<sup>25</sup> resold by the buyer. To this method of inquiry, it has been objected that parties making a contract think of performance rather than of breach of contract. To this the celebrated author of the British Sales of Goods Act replied:

"But the answer is this. The liability to pay damages for breach of contract is an obligation annexed by law independently of the volition of the parties, and the criterion is necessarily an objective one. What the parties themselves may have contemplated is immaterial. The question is what a reasonable man with their common knowledge would contemplate as a probable consequence of the breach if he applied his mind to it. The same result will be arrived at if the supposed contemplation of the parties be wholly eliminated."<sup>26</sup>

This is practically identical with the provision in the Restatement of the Law of Contracts:

"In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract is made. . . ."<sup>27</sup>

Indeed, the Restaters, very accurately, have pointed out

<sup>25</sup> *Hall, Ltd. v. Pim Jr. and Co., Ltd.* (1927) 33 Com. Cas. 324—H. L.

<sup>26</sup> CHALMERS, *The Sale of Goods Act*, 1893, s. 54.

<sup>27</sup> § 330. See Mr. Justice Holmes in *Globe Refining Co. v. Landa Cotton Oil Co.* (1902) 190 U. S. 540, 543.

that the requirement of foreseeability does not really depend on a previous consideration of a possible violation of contract, or on a tacit promise of compensation for it, but on the construction of the contract.<sup>28</sup> In this purified form, the common law principle is able to become the basis of a satisfactory general theory deriving the obligations of the parties from the *purpose* of the contract.<sup>29</sup>

In the same manner, the judicial standard for selecting the law is that of a man of average intelligence and knowledge such as is required in the profession or commerce of either party, who weighs the relative importance of all surrounding circumstances and the stipulations adopted.

The usual formula may mislead a judge into substituting the purpose of one party for the purpose of the contract. Or the inquiry into the probable intention of the parties may fail because each party is supposed to have differently conceived of the legal background. Frequently, in our day, one party prevails and drafts the contract or dictates the use of a blank. The Continental doctrine realistically concludes that the law at the domicil of this dominant contractant may be deemed to be chosen. Courts in this country are instinctively reluctant to increase his predominance by favoring his law. The latter view rests on considerations of public policy alien to our present problem; but, similarly, if a court applies the law of a carrier, bank, or mail-order house rather than that of the customer, this choice of law does not depend on any contemplation of the individual parties, but on the social and economic circumstances.

Another dubious feature in the traditional approach is the emphasis laid on too many "criteria" or "indicia." The judge is induced to consider a mass of irrelevant details—what bearing, after all, has the use of English language in

<sup>28</sup> Restatement, Law of Contracts § 510.

<sup>29</sup> RABEL, 1 *Das Recht des Warenkaufs* 484, 495ff.

a contract written in New York? He is beset by unnecessary doubts and tempted to weigh mechanically the various elements, rather than to ascertain the most characteristic local contact.

*Conclusion.* In conclusion, the task of the court is this: it has, in the absence of an agreement, first, to state whether the individual facts of the contract are colored by a certain law; if not, second, whether the contract belongs to a class typically centering in a certain country. This inquiry has to be done in full consideration of the circumstances personal and economical, but without inferring judicial or state policies.

## II. GENERAL RULES

### 1. Prima Facie Rules

The English proper law theory has developed certain presumptions or prima facie rules, ordinarily in former times in favor of the *lex loci contractus*, and in specific types of cases in favor of the *lex loci solutionis*, or the law of the flag, or the "most effective" law.<sup>30</sup> Similar methods prevail on the Continent in case investigation into the circumstances fails to reveal a presumable intention. In France and many other countries, the presumption for the law of the place where the contract is made, continues stronger than in England. In Germany and numerous other jurisdictions, following Savigny, the parties are presumed to have in view the law of the place of performance. In some countries, the fact that the parties have a common nationality or domicile constitutes a presumption prevailing over all others.<sup>31</sup>

The "presumption" in all these cases is meant as a guide for the judge, as a starting point and a subsidiary help. The

<sup>30</sup> CHESHIRE 259-269.

<sup>31</sup> Poland: Int. Priv. Law, art. 9 (common domicile).

Código Bustamante, art. 186.

Costa Rica: C. C. art. 7 par. 1 (common nationality).

court may or may not resort to it. The Wisconsin Supreme Court has once, facing an inflexible conception of *lex loci solutionis*, declared that the presumption is rebuttable through clear, though not necessarily direct, evidence to the contrary.<sup>32</sup> But the danger is great that the easy way of the presumption may be followed in neglect of the purpose of the individual contract. As a matter of fact, in many jurisdictions the presumption has slowly turned into a rigid, though merely subsidiary, rule.

It is wise, therefore, always to remember how artificial all these presumptions are. As Lord Wright has recalled for English law:

"English law in deciding these matters has refused to treat as conclusive rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis* and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts."<sup>33</sup>

## 2. Rigid General Rules

Rigid general rules have developed, as by transformation from original presumptions, also in the absence of an ascertainable intention, or when party autonomy was entirely repudiated. The most pronounced instance of all-inclusive general rules without any regard to party intentions appears in the Restatement.<sup>34</sup> The same system may also be regarded as dominant in the Scandinavian countries<sup>35</sup> and most Latin-American jurisdictions.<sup>36</sup>

<sup>32</sup> *D. Canale & Co. v. Pauly & Pauly Cheese Co.* (1914) 155 Wis. 541, 544, 145 N. W. 372, 373.

<sup>33</sup> *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.* [1938] A. C. 224, 240.

<sup>34</sup> §§ 332, 333.

<sup>35</sup> Sweden: 7 Répert. 136 No. 105.

Norway: 6 Répert. 578 No. 147.

<sup>36</sup> See *supra* pp. 37 off.

Such rigidity deprives the courts of the flexibility enjoyed by American courts under the proper law theory, when they want to escape an inherited *lex loci contractus*, and by German courts, when feeling the need of a corrective to the *lex loci solutionis*.

### 3. "No Rule"

In opposition to the mechanical working of conflicts rules purporting to include all obligatory contracts, a few writers have proclaimed that no fixed principle should govern contracts in general.<sup>37</sup> It has been replied that this proposal itself contains a general principle,<sup>38</sup> viz., that of an individualized choice of law.<sup>39</sup> This principle comes near in effect to the English doctrine of proper law, which avoids tying a court "down to any rigid presumption."<sup>40</sup>

### 4. The Most Characteristic Connection

Looking back on the tortuous development of doctrine, we see distinctly that Savigny's main principle, in the form given to it by Westlake and modernized again in our times, has gained supremacy. The Swiss Federal Tribunal, improving its older formulas, has formally declared that the effects of contracts should be governed by the law having the closest local relation with the contract.<sup>41</sup> In the frequent case of several substantial or even vital local connections of a contract, the degree of proximity may be hard to analyze. But it should always be possible to discover the *most characteristic* connection of an individual contract and, certainly, that of the usual types of business contracts.

<sup>37</sup> See DRAFT, ROGUIN, Actes de la 3ème Conférence de la Haye (1900) 62 art. 5 par. 3; JITTA, 2 La substance des obligations (1907) 509, 515.

<sup>38</sup> NOLDE, 32 Annuaire (1925) 119.

<sup>39</sup> See among others, 2 BAR 23; ROLIN, 32 Annuaire (1925) 96, 117, 513; LEWALD 197 No. 257; NUSSBAUM, D. IPR. 221, 226; BATIFFOL 73 § 80; RAAPE, D. IPR. 263.

<sup>40</sup> Words of DICEY 962.

<sup>41</sup> BGE.: 60 II 300; 63 II 385; 67 II 179, 181 ("constant practice").

This, in the opinion of the writer, is the direction in which all efforts ought to be concentrated.

We are now prepared to survey the main contacts selected either on the strength of a presumption or in virtue of a specific rule. That their importance as general devices is entirely questionable, is a foregone conclusion from the preceding discussion. The particulars, however, are significant.

## B. CONTACTS

### I. HISTORICAL NOTE

The statutists, in the manner of their time, exploited a few fragments of Justinianus' Digest. The "*lex contraxisse*" was the text most frequently cited:

D. 44, 7, 21, Julianus l. III. ad Minicium. *Contraxisse unus quisque in eo loco intellegitur, in quo ut solveret se obligavit.* This is commonly understood as meaning: every one is deemed to have contracted at the place where he should perform according to his promise (and not: where he promised the performance).

The jurist did not speak of the applicable law but probably, as other passages do, of jurisdiction in the case of bankruptcy proceedings which were alternatively at the domicil of the debtor or at the place where he had failed to satisfy the creditor.<sup>42</sup> Whether generally a creditor was entitled to sue in contract at the *forum solutionis*, as is commonly believed,<sup>43</sup> seems not certain.

Another basic text of the statutists, the "*lex si fundus*,"<sup>44</sup>

<sup>42</sup> See LENEL, *Palingenesia Juris Romani*, sub: Julianus 862; Dig. 42, 5, 1 and 3 (Gaius 23 ad ed. prov.); Gaius Inst. 3, 79. Other texts are mentioned by SAVIGNY 211 § 370 n. (c); LENEL, 27 *Zeitschrift der Savigny Stiftung, Romanistische Abteilung* (1906) 74.

<sup>43</sup> BETHMANN-HOLLWEG, 2 *Zivilprozess* (1865) 126ff.; L. WENGER, *Institutionen des Römischen Zivilprozesses* (1925) (Engl. transl. (1940) *Institutes of the Roman Law of Civil Procedure*) § 4 n. 60.

<sup>44</sup> Dig. 21, 2, 6 (Gaius 10 ad ed. prov.); cf. Dig. 50, 17, 34 (Ulpianus 45 ad Sabinum).

refers exclusively to the interpretation of a sale of land, and states that the obligation of warranty is that customary in the region.

It is interesting to note that the Romans in reality did not consider the problem and that the confusion clouding the matter was started by the earlier statutists.<sup>45</sup> Bartolus himself knew of the two kinds of "*locus contractus*," ever since in the mind of writers, and understood both fragments mentioned as referring to the place where the promisor has obligated himself, that is, where the contract is made, *locus ubi est celebratus contractus*, while *locus in quem collata est solutio*, the place of performance, figures in a rule which he deduced from other passages. To harmonize these conflicting rules, he distinguished the rights deriving from the contract at its origin (*quae oriuntur secundum ipsius contractus naturam tempore contractus*), from the effects of subsequent events, such as the consequences of nonperformance or default (*quae oriuntur ex postfacto propter negligentiam et moram*).

The first were to be governed by the law of the place where the contract was celebrated; the second by the law of the specific place of performance, because the default occurred there; or if this place were not specified, by the law of the forum. In the fifteenth century, Paulus de Castro<sup>46</sup> added a basic argument for the law of the place of contracting:

*Quia talis contractus dicitur ibi nasci ubi nascitur, et, sicut persona ratione originis ligatur a statutis loci originis, ita et actus.*

The law under which a contract is created, is its natural statute, quite as a person is bound by the law of the place of his origin!

<sup>45</sup> BARTOLUS, l. 1 C. de S. Trinitate 1.1, §§ 13-18; cf. WAECHTER, 25 Arch. Civ. Prax. (1842) 42; 1 LAINÉ 135.

<sup>46</sup> Paul. de Castro ad l. Si fundus, Dig. 21, 2, 6.



These conceptions were maintained, developed, and modified by subsequent generations of jurists and reappear astonishingly well preserved in the doctrines of Beale.

## II. LAW OF THE PLACE OF CONTRACTING

### I. To Govern the Entire Contract

By *logical necessity*. Canonists as early as about 1200 A.D., and statutists from the fifteenth century, have regarded the law of the place where a contract is "celebrated" as naturally governing.<sup>47</sup> The variants of this school became numerous, and Anglo-American conflicts law has experienced the tenacity of that radical branch of opinion conceiving a contract "born" in and created by the sovereign of the territory where the parties agree. It is well known that in the Virginia Convention, when a member asked which state determines a contract, Marshall replied that this was decided according to the laws of the state where the contract was made, and those laws only.<sup>48</sup> In a celebrated English case of 1865,<sup>49</sup> the rule of *lex loci contractus* was still based on the thesis that domiciled persons are subjects of the territorial compulsory power of the sovereign and temporary residents also owe him allegiance. For a long time writers of international law have invoked Ulric Huber's deduction from the principle of territorialism, that the *lex loci contractus* is endowed with extraterritorial authority.<sup>50</sup> The axioms of Dicey and Beale stemmed from the same roots.

<sup>47</sup> NEUMEYER, 2 *Gemeinrechtliche Entwicklung* 84, 135ff.; WAECHTER, 25 *Arch. Civ. Prax.* (1842) 42.

<sup>48</sup> ELLIOT, 3 *Debates on the Federal Constitution* (ed. 2 Philadelphia 1866) 556.

<sup>49</sup> *Peninsular and Oriental Steam Navigation Co. v. Shand* (1865) 3 *Moo. P. C. Cas.* (N. S.) 272, 290.

<sup>50</sup> HUBER, *De conflictu legum* XV, cf. V (in SAVIGNY, tr. Guthrie, 515, 510); see WHEATON, *International Law* (ed. Carnegie Endowment 1936) 125 § 90; TAYLOR, *International Public Law* (1901) § 170.

By *presumed intention*. Although, in the doctrine of Du-moulin, Boullenois, and Bouhier, the law of the place of contracting lost its leading role which was taken by the intention of the parties, the same result still obtained in the absence of contrary evidence by general presumption.<sup>51</sup>

At present, the *lex loci contractus*, as a general rule by virtue of a rebuttable presumption *de facto*, continues to apply in France,<sup>52</sup> Belgium,<sup>53</sup> Argentina,<sup>54</sup> Spain,<sup>55</sup> and other countries,<sup>56</sup> while the Dutch courts<sup>57</sup> are as much divided as the American. It is also sometimes claimed that it remains the primary contact in England, where no other law is intended or presumed, and this seems true in the Dominions.<sup>58</sup> But it may be doubted whether the law of the place of perform-

<sup>51</sup> See DICEY 885; 2 BEALE 1090ff.; BATIFFOL 22, 35.

<sup>52</sup> Cass. (civ.) (Dec. 5, 1910) S.1911.1.129.

<sup>53</sup> Trib. com. Anvers (Dec. 15, 1904) Revue 1907, 970; Trib. civ. Anvers (May 14, 1926) Jur. Port Anvers 1926, 132, 136; POULLET 372 § 299.

<sup>54</sup> Argentina: C. C. art. 1205 (1239) regarded as representing the principle, see 3 VICO 122 § 137; ROMERO DEL PRADO, 2 Manual 343 notes that the codifier has followed STORY §§ 242, 280.

<sup>55</sup> Spain: TRÍAS DE BES, 6 Répert. 257 No. 124 par. 2.

<sup>56</sup> Denmark: As a limited rule, see BORUM and MEYER, 6 Répert. 224.

Italy: For civil contracts on the basis of Disp. Prel. 1865, art. 9 § 2: App. Trieste (Jan. 7, 1937) Riv. Dir. Com. 1937 II 547; Disp. Prel. 1942, art. 25, which are probably to be understood to apply a factual presumption.

Código Bustamante, art. 186, at least nominally speaks of *lex loci contractus*, if the parties are of different nationalities, as a presumption; it seems, however, that no counterproof is allowed, see art. 184 par. 2, which substitutes the criteria of art. 186 for the tacit intention of the parties.

<sup>57</sup> The Netherlands: See for the cases, VAN HASSELT 176 and Supplement 45. The attempt by KOSTERS 774 to base the *lex loci contractus* rule on art. 1382 of the Civil Code prescribing construction of contracts according to the local customs, has been abandoned by the author himself in Themis 1926, 480; cf. E. M. MEIJERS, Note in N. J. (1927) 323.

<sup>58</sup> England: CHESHIRE 261 principally alleges Peninsular and Oriental Steam Navigation Co. v. Shand (1865) 3 Moo. P. C. Cas. (N. S.) per Turner, L. J., 272, 290 and another case, both of which, however, deal with transportation.

Canada: The principle is confirmed in Bondholders Securities Corp. v. Manville (Sask.) [1933] 4 D. L. R. 699; Comm. Corp. Securities, Ltd. v. Nichols (Sask.) [1933] 3 D. L. R. 56 (bills and notes); see also 3 JOHNSON 457 n. 1 and the Digests.

South Africa: De Wet v. Browning (1930) S. A. L. R. Transvaal Prov. Div. 409 (sale of land, *laesio enormis*).

ance has not in fact won precedence in the favor of the English courts.<sup>59</sup>

*By fixed conflicts rule.* On this historical background in many countries the *lex loci contractus* has become the law generally applicable to contracts, either as a subsidiary rule in the absence of contrary intention of the parties or even with higher pretensions. The list of codes thus providing is long.<sup>60</sup>

That this favor has been so tenaciously granted to a device of very difficult application, must have been aided by the universal acceptance of the same law to control the formalities of contracts. In Lorenzen's opinion, the American law has never adopted that distinction between form and substance in contracts, by which in the Continental doctrine the old adage, *locus regit actum*, was confined to formalities.<sup>61</sup> A modern

<sup>59</sup> See RABEL and RAISER, 3 Z.ausl.PR. (1929) 66; BATIFFOL 90 § 99.

<sup>60</sup> Georgia: C. Ann. (1937) § 102-108 (8) first sentence.

Austria: C. C. §§ 36, 37 with exceptions.

Belgian Congo: C. C. art. 11 par. 2.

Brazil: C. Com. art. 424, replaced by Law No. 2044, of Dec. 31, 1908, art. 47; for bills of exchange, generalized by the doctrine, see BEVILAQUA (ed. 3) 365; C. C. Introd. (1916) art. 13 par. 1; while Introd. Law (1942) art. 9 is silent, the rule is considered maintained, see ESPINOLA, 8-C Tratado 1811 §§ 148, 150.

Bulgaria: See MAKAROV, 8 Z.ausl.PR. (1934) 660.

China: Int. Priv. Law, art. 23 par. 1.

Costa Rica: C. C. art. 7 par. 1.

French Morocco: Int. Priv. Law, art. 13 par. 2.

Guatemala: Law of Foreigners of 1936, art. 24 sent. 1.

Italy: Disp. Prel. (1865) art. 9 par. 2; (1942) art. 25; former C. Com. art. 58.

Japan: Int. Priv. Law, art. 7 par. 2.

Panama: C. Com. art. 6 (1) not altered by Código Bustamente in relation to the United States, see EDER, 15 Tul. L. Rev. (1941) 521 at 524 n. 283.

Peru: C. C. (1936) art. VII.

Poland: Int. Priv. Law, art. 9 Nos. 1, 2.

Portugal: C. Com. art. 4 § 1.

Quebec: C. C. art. 8.

Soviet Russia: Codes of Civil Procedure, art. 7, cf. STOUNITSKI, 7 Répert. 114 Nos. 156, 157; RASHBA, "Settlement of Disputes in Commercial Dealings with the Soviet Union," 45 Col. L. Rev. (1945) 530, 552.

Spanish Morocco: Int. Priv. Law, art. 20.

<sup>61</sup> LORENZEN, 30 Yale L. J. (1921) 655 at 664.

writer has directly accused the rule prescribing the law of the place of contracting for all contracts as arising out of a confusion between form and content.<sup>62</sup>

The Soviet codes of civil procedure prescribe with very cautious words that the court should "consider" the law of the place in a foreign country where contracts and documents have been made. The more recent Ukrainian version is more categorical on this point. But writers have seen in this hint not a conflicts rule but an advice that Soviet law is controlling in every single case.<sup>63</sup>

## 2. To Govern the Making of Contracts

The old doctrine expressed by Bartolus has produced various theories, splitting the problems of contracts into origin and subsequent events.<sup>64</sup> Story<sup>65</sup> and Savigny,<sup>66</sup> however, repudiated these efforts by adopting an all-inclusive law of the contract and in this respect were followed by the great majority of scholars. Nevertheless, some writers in the nineteenth century returned to the method of dividing contracts into two parts.<sup>67</sup> The formulas were varying, but none was in precise terms. The leading idea seemed to be that the local law of the place of contracting should govern the legal

<sup>62</sup> ROGUIN, *Actes de la 3ème Conférence de la Haye* (1900) 62.

<sup>63</sup> KELMANN, *Int. Jahrb. Schiedsger. Wesen* (1928) 84 n. 34; MAKAROV, *Précis* 299 (slightly more optimistic in assuming resemblance to a conflicts rule).

<sup>64</sup> BURGUNDUS, *Tractatus* 4 Nos. 7, 10, 29; BOULLENOIS, *Traité de la personnalité et de la réalité des lois* (1766) Vol. II, 451; CASAREGIS, *Discursus legales de commercio*, Disc. 179 §§ 56ff. P. VOET, *De statutis eorumque concursu*, sect. 9 cap. II No. 12 (SAVIGNY, tr. Guthrie, 490); Prussian *Allgemeines Landrecht* I, 5 § 256ff.

For refutation: WAECHTER, 25 *Arch. Civ. Prax.* (1842) 41; GUTZWILLER 1610.

<sup>65</sup> STORY § 280, as he thought, in conformity with the Roman law.

<sup>66</sup> SAVIGNY § 372, tr. Guthrie 225, although his method of treating the Roman sources is not approved at present.

<sup>67</sup> 1 FOELIX § 109; VALÉRY 987 § 685; 1 FIORE §§ 119, 121 and in 20 *Annuaire* (1904) 176; in Spain: MANRESA, 1 *Comentarios Cód. Civ. Esp.*, art. 11 § IX; VALVERDE, 1 *Trat. Der. Civ.* (ed. 3) 129; FOELIX's doctrine has impressed PHILLIMORE, 4 *International Law* §§ 709ff.

effects naturally arising from, and inherent in, the contract, or believed to be positively intended by the parties. This reasoning still clung to the belief that these "effects" necessarily grow out of the local law. These are contrasted with "suites" of the contract, i. e., the influence of more remote or unforeseen events, such as acts of God, new legislation, insolvency, illness, impossibility, or any cause of nonperformance, including the problems of fault, default, and damages as well as the ratification of a void contract. These ulterior influences on the contract are deemed subject to the law of the places either where performance was due, or where the events occur. Again, this theory has been decisively criticized. "Consequences, effects, suites: these three words appear synonymous to us."<sup>68</sup> But strong remnants of the old bisection are to be found in court decisions and in the teachings of Minor and Beale.<sup>69</sup> The Restatement, unfortunately, has solemnly proclaimed this very approach (§ 332).

While American courts, however, pay no more than lip service to this theory, in Switzerland the original idea has been fully received by the Federal Tribunal. This court subjects, by imperative rule, all problems connected with the creation of contracts to the law of the place where they are made.<sup>70</sup> The "effects" of the contract are left to the intention of the parties and subsidiarily to the law of the place of performance. The Swiss literature is divided on this question.<sup>71</sup>

<sup>68</sup> ASSER-COHN 46; ASSER-RIVIER 81 § 37 (sometimes erroneously cited as follower of FOELIX); SURVILLE 355, 357; HARBURGER, 19 *Annuaire* (1902) 137; ROGUIN, *id.* (1904) 77; ROLIN, *id.* (1906) 199; DESPAGNET 897 § 303; NOLDE, *Revue* 1926, 448.

<sup>69</sup> MINOR 401; 2 Beale 1199 § 346.1. *Contra*: see BATIFFOL 69 § 77.

<sup>70</sup> *Supra* pp. 396-397. For the purpose of the special case concerning the extent of authority of an agent making the contract, the Federal Tribunal expresses the rule in the form that the conflicts rule of the place of contracting determines whether the contract is perfected. BG. (Dec. 14, 1920) 46 BGE. II 490, 494.

<sup>71</sup> FRITZSCHE, 44 Z. Schweiz. R. (N. F.) (1925) 229a, 245a, 257a;

*Illustration.* Where a dye firm in Milan sent an agent to Zürich to buy dyes, the Federal Tribunal determined under Swiss law the question whether the firm or the agent was the party to the contract, and under Italian law whether the buyer was entitled to reject the merchandise.<sup>72</sup>

It is true that the Supreme Court of the United States once also, in 1875, pronounced the rule that the formation and validity of contracts follow the *lex loci contractus* while matters regarding performance are subject to the *lex loci solutionis*.<sup>73</sup> This leading case has had some following but has been regularly disregarded by the Supreme Court itself. The German Reichsgericht has occasionally used arguments of this kind in case of a mistake made in applications for insurance.<sup>74</sup>

*Impracticability of the division.* While the various approaches resulting in bisecting the development of the contract produce somewhat different disadvantages, their common idea is inadequate. A conflicts rule concerned with validity or formation must include the extent of the obligation created, as Beale has conceded. But there is no consistent dividing line possible between the extent of a contractual obligation and its performance. Both together form the purpose of the contract and are its very core. Whether an event making performance impossible or onerous frees the debtor from his entire duty, or only from paying damages, or not at all, is determined by the distribution of effort and risk implied in the contract.<sup>75</sup>

SAUSER-HALL, *id.* 298a, 319a; OSER-SCHOENENBERGER, Allg. Einleitung LIV § 51; SCHNITZER (ed. 2) 522 (strongly disapproving); HANS-WERNER WIDMER, Die Bestimmung des massgeblichen Rechts im int. Vertragsrecht (Zürcher Studien zum Int. Recht, Heft 9) (1944) 102 (disapproving).

<sup>72</sup> BG. (March 5, 1923) 49 BGE. II 70. See also the proposals by LAPAJNE, 4 Bl. IPR. (1929) 65.

<sup>73</sup> Scudder v. Union National Bank (1875) 91 U. S. 406.

<sup>74</sup> RG. (Dec. 4, 1926) JW. 1927, 693; (Dec. 23, 1931) IPRspr. 1932, 61 No. 30.

<sup>75</sup> For consequences, see *infra* pp. 531, 537, 542, 576-577.

This is true of the civil law systems, in which specific performance is the object not only of the obligation but also of the judgment in case of breach. It is equally true in common law, although merely the duty to pay damages for non-performance is enforced. For it is always the contractual promise that creates the primary object of the obligation.<sup>76</sup>

### 3. American Law

Surveys covering cases in the United States are unanimous in stating that validity of contracts is tested in the courts by varying criteria.<sup>77</sup> In Beale's own statistics of 1910, only a minority of six states professed to follow the place of contracting rule.<sup>78</sup> In 1934, he claimed that under the influence of the Restatement drafts the number of these states had increased to eleven certain and eleven other dubious states,<sup>79</sup> but these statements have been criticized in several respects.<sup>80</sup> On the basis of recent observations, we ought to be aware of the fact that the cases in which courts have resorted to this rule, pertain to at least four groups.

(i) In the majority of the cases, no problem is presented, particularly when the place of contracting and that of performance, or the former and the domicile of the parties are situated in the same jurisdiction, and no other connection competes in significance.<sup>81</sup>

(ii) In other cases the contract is made in a jurisdiction where also some other element considered determinative

<sup>76</sup> See BUCKLAND, "The Nature of Contractual Obligation," 8 *Cambr. L. J.* (1944) 247, against Holmes.

<sup>77</sup> See 2 BEALE 1077; GOODRICH § 107; STUMBERG 200-215; ROBERTSON, *Characterization* 176; 15 *C. J. S. Conflict of Laws* (1939) § 11; 11 *Am. Jur.* (1937) 397 § 116.

<sup>78</sup> BEALE, 23 *Harv. L. Rev.* (1910) 194 at 207.

<sup>79</sup> 2 BEALE 1172 and 1173 with respect to a doubtful presumption for this law in New York.

<sup>80</sup> See in particular BATIFFOL 87 § 96; NUSSBAUM, 51 *Yale L. J.* (1942) 892, 901ff.

<sup>81</sup> MUELLER, 8 *Z.ausl.PR.* (1934) 888.

occurs, although performance and domicile of one, or even of both parties may be elsewhere. For instance, contracts of carriers are ordinarily subjected to the law of the place where the contract is made and the transport begins.<sup>82</sup>

(iii) Not infrequently, lip service is paid to the place of making rule, while in fact a quite different law is applied.<sup>83</sup>

(iv) The rule is mechanically applied without appreciable discernment in a considerable number of cases. Moreover, it is not the habit of the courts when they apply the law of the place of contracting to a problem of validity, to decide whether the same law would apply also to other contractual problems. And conflicts respecting validity are in an overwhelming majority in this country, a phenomenon obviously caused by the differences of statutes in such matters as statute of frauds, usury, exemption from liability, or Sunday laws, in contrast to the uniformity of the common law rules on performance.

All this warns strongly against Beale's statistical estimates. Not only is the exclusive force of his validity rule inconsistent with the existing law but its significance for the development of the practice is greatly overestimated. Scholars of such intimate knowledge of the decisions as Lorenzen and Batiffol conclude that, wherever the choice between contracting and performance has become material, the latter has been emphasized by the courts.<sup>84</sup>

#### 4. Determination of the Place of Contracting

Where is the place of contracting? Which law has to govern this question? We do not share the opinion of an old Canadian case that "the question as to what country is the

<sup>82</sup> BATIFFOL 239 § 267.

<sup>83</sup> Cf., e.g., *infra* pp. 458f., 461.

<sup>84</sup> LORENZEN, 30 Yale L. J. (1921) 565 at 578; BATIFFOL § 96. We shall have to make our own remarks at a later juncture.



*locus contractus* in each particular case is not a question of foreign law, it is a question of fact."<sup>85</sup> Without exhausting the much debated matter, we ought to mention a few delicate points.

*Contracts between absent persons.* The present municipal laws are notoriously in disagreement on the question at which *moment* a contract in the making by correspondence<sup>86</sup> emerges from preliminary negotiations. At common law, a contract is considered executed as soon as the addressee of an offer dispatches his acceptance (theory of expedition, mailbox-theory, *Übermittlungs-Theorie*). Civil law countries are divided in their adherence to the following views: that acceptance must only be declared (theory of declaration, *Aussendungs-Theorie*); or must arrive at the offeror's address (theory of arrival, *Zugangs-Theorie*); or must be received by him (theory of reception, *Empfangs-Theorie*); or must come to his knowledge (theory of information, *Vernehmungs-Theorie*). It is by no means settled that all these views of the time when negotiations arrive at the stage of binding force, justify conclusions on the question at what *place* a contract is made. But generally this seems to be taken for granted. If so, it is important which law is decisive to answer the question where "the place of contracting" is. (There arises, of course, the other problem whether a contract is created at all, but this will be discussed later.)

*Illustration.* In 1913, when Trieste was Austrian, an insurance company domiciled in that city concluded contracts by a general representative in Tunis, on the basis of "gold francs." In 1934, after the various currency depreciations, Italian courts having to decide on the amount of the insurance

<sup>85</sup> *Cloyes v. Chapman* (1876) 27 U. C. C. P. 22, 31.

<sup>86</sup> For comparative law, see RABEL, 1 *Recht des Warenkaufs* 69-108; Institut International de Rome pour l'Unification du Droit Privé, *De la formation des contrats entre absents. Étude Préliminaire* (mimeographed) S. d. N.—U. D. P. 1935, Étude XVI.

claim, followed the conflicts rule of the Austrian Civil Code (§§ 36, 37) which refers to the law of the place of contracting. Although the construction of these provisions is doubtful, it was assumed that a contract is concluded under Austrian civil law by information to the offeror and under Austrian commercial law sometimes by information and in other cases by expedition of the acceptance, while it was believed that under French law applicable in Tunisia, declaration of acceptance was decisive (which is doubtful, too). The Italian courts, for the purpose of applying the Austrian place of making rule, attempted to ascertain the location of this place under the *lex fori*, which meant in this case the Austrian Commercial Code and, consequently, held the contract to have been perfected by delivery of the policy through the agent in Tunis. Therefore, French municipal law was to govern the money problem.<sup>87</sup>

The method, hence, is the same as that used in ascertaining jurisdiction. Supposing a court has jurisdiction to judge a breach of contract only if the breach occurs in its district, an ordinary simple case is decided as follows:

Plaintiff resided in Ontario but carried on business in Montreal. He sold this business to the defendant; the agreement was executed by plaintiff in Toronto, sent to defendant in Montreal, and signed by him there. The Ontario court held that the execution in Montreal completed the contract, hence the Quebec law applied to the effect that the place of payment was at the domicil of the debtor. Therefore, the breach of contract took place in Quebec, and the Ontario court had no jurisdiction.<sup>88</sup>

This astonishing game of lawyer's niceties may, in this case, rest on the unexpressed background that an Ontario court does not want unnecessarily to interfere with the sale of a business in Quebec. This, in fact, would furnish a wise

<sup>87</sup> App. Trieste (Jan. 25, 1934) 2 Recueil général relative au droit international (ed. Lapradelle) 1935.3.101.

<sup>88</sup> Phillips v. Malone (1901) 3 O. L. R. 47, *aff'd* (1902) 3 O. L. R. 492 (D. C.).

rule. But embarrassment is the daily characteristic of the prevailing approach.

Every court using this method applies its own domestic theory. An English court will stress the place where the letter of acceptance is posted.<sup>89</sup> A Canadian will do likewise, provided that this letter reaches the offeror.<sup>90</sup> It is true that a merely casual mailing on a voyage need not necessarily be accepted as decisive.<sup>91</sup> The conflicts laws of Japan and China provide for the same solution.<sup>92</sup> Belgian, Italian, and Swiss courts employ their own theories of reception<sup>93</sup> or information,<sup>94</sup> and the French courts, being divided in the municipal domain, follow each its usual view.<sup>95</sup>

<sup>89</sup> *Benaïm and Co. v. Debono* [1924] A. C. 514, 519; *Muller & Co. v. Inland Revenue Commissioners* [1927] 1 K. B. 780, *aff'd* [1928] A. C. 40—H. L.; *WESTLAKE* § 224.

<sup>90</sup> *Magann v. Auger* (1901) 31 S. C. R. 186 applied to these problems, see cases in 3 *JOHNSON* 670 n. 1; *Charlebois v. Baril* [1927] 3 D. L. R. 762.

<sup>91</sup> *CHESHIRE* 263; 3 *JOHNSON* 473; *MANN*, 18 *Brit. Year Book Int. Law* (1937) (*supra* p. 397 n. 18) at 104. *COOK*, *Legal Bases* 425 regards casual places of mailing ruled out by the real meaning of the place of contracting, which he does not explain, however. French courts resort to interpretation of the intention of the parties; see, for instance, *Trib. civ. Seine* (July 5, 1939) *Revue Crit.* 1939, 450, Note, *id.* 456: agreement between three German refugees in a hotel room in New York, German law common to all applied. Compare the refusal to apply the *lex loci contractus* in the case of a Sunday contract made in a hotel room of New York, *Brown v. Gates* (1904) 120 *Wis.* 349, 97 N. W. 221, *infra* Chapter 33, p. 564 n. 36.

Switzerland: *BG.* (July 12, 1938) 64 *BGE.* II 46.

<sup>92</sup> Japan: *Int. Priv. Law*, art. 9.

China: *Int. Priv. Law*, art. 23.

<sup>93</sup> Belgium: *App. Bruxelles* (March 14, 1924) *Jur. Com. Brux.* 1924, 146; *Trib. com. Liège* (Nov. 19, 1926) *Pasicrisie* 1927 III 69; *Trib. com. Bruxelles* (Dec. 17, 1936) *Jur. Com. Brux.* 1937, 93; noted *Clunet* 1938, 359.

Italy: (C. Com. art. 36): *App. Milano* (Dec. 11, 1888) *Clunet* 1892, 512; (*Disp. Prel* (1865) art. 9): *Trib. Trento* (June 10, 1926) *Monitore* 1926, 620, and with respect to taking jurisdiction at the place where obligations originate, *Cass.* (Aug. 3, 1935) *Rivista* 1935, 372, 374 (place where the offeror acquires knowledge of the acceptance). Where no answer is requested, the place of acceptance is decisive, *App. Genova* (Nov. 27, 1906) *Clunet* 1907, 1199; *Cass. Napoli* (Sept. 18, 1914) *Clunet* 1915, 703. The new Civil Code, art. 1326 par. 1 requires knowledge of the acceptance.

Switzerland: *HOMBERGER*, *Obl. Verträge* 53; *SCHNITZER* 282; *NIEDERER*, 59 *Z. Schweiz. R. (N. F.)* 247.

<sup>94</sup> *KOSTERS* 763, 766.

<sup>95</sup> *SURVILLE* 340 n. 2, 341; *BACCARA*, 5 *Répert.* 223 No. 26 (distinguishing

If the internal systems involved agree, some writers presume an implied agreement of the parties in favor of the law thus indicated.<sup>96</sup>

Proposals flowing from awareness of the international purpose of conflicts law have either radically discarded the role of "contracting" in case of correspondence,<sup>97</sup> or have pointed rather to the place from which the first offer is sent, the offer deserving preference over the acceptance as the initial step and the basis of the contract.<sup>98</sup>

*United States.* Characterization according to the *lex fori* has recently been advocated also in this country.<sup>99</sup> However, thanks to the fairly uniform doctrine of contracting in the United States, the problem does not present itself with the same acuteness. The Restatement had no difficulty in providing on principle that the place of contracting is the state from which the acceptance is sent (§ 326, b), parallel, though not in necessary conjunction, with the principle that a contract is made at the time when the last act contributing to the consent is done, as formulated in the Restatement of Contracts, § 64. But it is not clear whether this proposition, which is specifically American, applies to a contract made by cor-

four systems); App. Rennes (Dec. 15, 1891) Clunet 1892, 912 (theory of declaration of the acceptance); App. Colmar (March 11, 1925) Clunet 1926, 411 (arrival of the letter of acceptance; possibly following the German view).

<sup>96</sup> KOSTERS 768.

<sup>97</sup> See the authors cited *supra* n. 37.

<sup>98</sup> To this effect the old writers cited by WAECHTER, *supra* n. 64, at 45; in modern times, SURVILLE, in Clunet 1891, 361, *cf.* 1028; DIENA, 1 Dir. Com. Int. 478; LEREBOURS-PIGEONNIÈRE 449 § 360; WALKER in 1 Klang's Kommentar 318 and authors cited; Institute of Int. Law, resolutions of 1908, art. 4, 22 Annuaire (1908) 99, 285, 291.

Poland: Int. Priv. Law, art. 9 No. 1 sent. 3: where the offeror receives the acceptance of the offer.

Treaty of Montevideo on Int. Civil Law (1889) art. 37; (1940) art 42: law of the place of dispatching the offer.

Brazil: Introd. Law (1942) art. 9 § 2: law of the place of residence of the offeror; ESPINOLA, 8-C Tratado 1811 § 148 Note (p), wonders why the domiciliary test, ordinarily basic for the new law, is discarded.

<sup>99</sup> 2 BEALE 1046 § 311.2; Restatement § 311; House v. Lefebvre (1942) 303 Mich. 207, 6 N. W. (2d) 487.

correspondence between persons in San Francisco and Mexico City,<sup>100</sup> or New York and Paris. If so, the *lex fori* doctrine of the other countries is followed with the identical disastrous effect, that different places of contracting will be stated in the courts concerned, and thus different results are produced under the same conflicts rule.

*Binding force of offers.* An analogous problem arises out of the diverse effects of offers.

*Illustration.* Renfrew Flour Mills in Ottawa, Ontario, offered to Sanschagrin, limitée in Trois-Rivières, Quebec, 40,000 bags of flour with the proviso that "the contract must be entered into within eight weeks, otherwise this offer is to be withdrawn." Before the end of the time, however, the offer was retracted. Under Quebec law, the offer, strangely termed a "*contrat unilatéral*," was considered binding. Ontario law does not recognize a transaction without consideration. The court applied Ontario law without squarely facing the problem.<sup>101</sup>

*Various cases treated in the Restatement.* The Restatement devotes twenty-one sections to the determination of the place of contracting. Some of these provisions are highly questionable. For instance:

"A, in state X, writes to the M company, a mail-order house in state Y, ordering a stove from M's catalog and offering to pay the catalog price. M in response to the letter procures the shipment of the stove from its factory in state Z. The contract to pay for the stove is made in Z." (§ 323, illustration 5).

This type of contract, termed in the Restatement an "informal unilateral contract," at common law has not been absorbed into the ordinary concept of sales contracts. A's promise of payment is made under the condition that B send

<sup>100</sup> Mexico: C. C. art. 1807 requires reception of the acceptance by the offeror.

<sup>101</sup> Renfrew Flour Mills v. Sanschagrin, limitée (1928) 45 Que. K. B. 29.

the stove.<sup>102</sup> Therefore, obviously the Restatement draws an analogy between mailing a letter of acceptance and expedition of the stove. But it forgets that business letters concluding a sale are usually posted at some place of management and not sent from a mere manufacturing plant situated in another state. Reasonably, the place of shipment may determine the applicable law, if an individual stove is bought and the buyer knows of its location in Z, or if the catalog states that delivery shall be made at the factory or warehouse in Z. In the given example the solution is inadequate.<sup>103</sup>

If the Restatement localizes rights arising from tort at the place where the last act completing an injury is done, this is a tolerable solution because the *lex delicti commissi* is closely connected with territorialism. But the two questions when and where a contract is concluded, ought not to be indiscriminately identified. The time of completion is of great importance for many problems of substantive law in which the place is of none.<sup>104</sup> Again, in private international law, localization should be subordinated to foreseeability by the parties and other considerations of convenience.

Another striking illustration to the same section ventures the following bizarre solution:

A father in state X promises his son \$10,000 if he marries M. The son marries M in state Y. The contract for payment of the money is made in Y.

The mistake of confusing the making of a conditional promise with the fulfillment of the condition underlies also § 312 stating that: "when a formal contract becomes effective on delivery, the place of contracting is where the delivery is made." This rule would mean that not the place of making

<sup>102</sup> Restatement of the Law of Contracts §§ 12, 55.

<sup>103</sup> COOK, Legal Bases 384, observes that the cases are directly contrary to the illustration given in the Restatement.

<sup>104</sup> RABEL, 1 Recht des Warenkaufs 93.

but that of performance governs. The same is true if a guarantee for future credits is localized at the place "where the credit is given in reliance upon the guarantee" (§ 324).<sup>105</sup> Whether these rules are sound in themselves, is another matter.

*Discretionary assumptions.* This survey would be incomplete without noticing that the uncertainty included in the principle of *lex loci contractus* is sometimes welcomed by the courts. When a proposal is sent from one state to another, or an agent intervenes in transmitting an order, an application, an insurance policy, a note, prepared here and sent there for approval and signature and then forwarded again to a third state—a court may sometimes manage an equitable decision concerning the capacity of a married woman or the violation of a usury statute, by purposefully locating the place of contracting in the desirable jurisdiction. It is a process similar to the stating of an individual's domicile so as to reach a final judgment seeming sound, both tricks that may appear satisfactory so long as the conflicts rules are not.

*Contracting in another state.* Finally, the *lex fori* theory encounters another obstacle. As will be remembered, it has been urged that a court should not assume domicile (like nationality), to exist in another state, contrary to what is assumed in that state itself. It is not less strange that states X and Y should each locate an individual contract in the territory of the other, and in this way obtain opposite results as to validity or effect. Such a negative conflict of conflicts rules is particularly queer in view of the traditional support of *lex loci contractus* by the idea that the contract is dominated by the state of its origin. The truth of the matter is that the *lex loci contractus* is a fallacious device wherever the making of a contract is substantially connected with two states.

<sup>105</sup> This section has been already criticized by NUSSBAUM, *Principles* 171.

## 5. Rationale

Critical appraisal of the *lex loci contractus* has been so frequent and thorough that only a short résumé is called for.

Once, the law of the place of contracting was deduced from some idea of sovereign power over the persons doing acts in the territory, and simple facts were faced such as a sale in an open market, or a deed solemnly executed in an official's room, the latter a case still enjoying a privileged place in some otherwise poor conflicts codifications. Of all the theories of sovereignty, territorialism, and vested rights, none has survived criticism. *Lex loci contractus* is no logical necessity for any problem. This much has become a commonplace despite Beale and the Swiss courts.

Respecting arguments of convenience, the place of contracting has lost its obviousness in all those modern situations in which either there is no one such place or the place of creating the contract has no significance for the purpose of the contract.

Followers of this inherited approach, it is true, never grow tired of assuring us that it is the most certain place, best known to the parties who therefore can easily ascertain the applicable law. Hence, the rule should at least serve well as a general subsidiary precept.<sup>106</sup> The adversaries, from Savigny to Wharton, Dicey, Lorenzen, and innumerable Continental writers, point to the accidental nature of this place in our epoch of travel, the indifference of most parties to the local law, or for that matter, to any law, and the difficulties inherent in contracts by correspondence.<sup>107</sup> All international draft proposals have rejected the *lex loci contractus*.<sup>108</sup>

<sup>106</sup> Most recently, CAVERS, Book Review, 56 Harv. L. Rev. (1943) at 1173, claims usefulness of the Restatement rule, because it provides ready answers.

<sup>107</sup> LORENZEN, 30 Yale L. J. (1921) 565, 655; *id.*, 31 Yale L. J. (1921) 53.

<sup>108</sup> See ROGUIN, Actes de la 3ème Conférence de la Haye (1900) 62; DE VISSCHER, 48 Recueil (1934) II 354-356; NOLDE, 32 Annuaire (1925) 62-64; STUMBERG 206; BATIFFOL §§ 83-85.



The solution ought to depend on the facts. When a contract is concluded in a state where both parties live, or in an international market, or in a cash and carry operation between a resident and a transient, all practicable theories agree on the law of this state as a subsidiary rule. But the real problems begin beyond this circuit. The rule is a device insufficient in itself, because it needs supplementary facts to operate, and is inadequate in many cases. It defies common sense every time when it makes the fate of a contract dependent on the legalistic finesses determining at what place the deal was completed in the juristic sense.

Under this angle, it is regrettable that even some advocates of the law of the place of performance take refuge in the law of the place of contracting *as such*, when the former is uncertain or insignificant.<sup>109</sup> This seems rather to prove the defective nature of all schematic rules for contracts in general.

Courts adhering to this venerable but unreliable tradition, have often turned the tables on it. Sometimes the old *quid pro quo* of the Pandectists has been used, calling the law of the place of performance the *lex loci contractus*,<sup>110</sup> or confusing *lex loci contractus*, that is, the law in force at the place where the contract is made, and *lex contractus*, that is, the law governing the contract as a whole.<sup>111</sup> These artifices have been censured.<sup>112</sup> Again, as early as 1892, *lex loci contractus* has been referred by a sensible American court "to the place of the *seat* of the contract as distinguished from the place

<sup>109</sup> BATIFFOL 87.

<sup>110</sup> Dig. 44, 7, 21, *supra* n. 42; DICEY, Appendix Note 5 p. 885; Pritchard v. Norton (1882) 106 U. S. 124, per Matthews, J.; Johnson County Savings Bank v. Walker (1908) 80 Conn. 509, 69 Atl. 15; Blandi v. Pellegrini (1915) 60 Pa. Super. Ct. 552.

<sup>111</sup> See 15 C. J. S. 880. French writers often use *lex loci contractus* in this sense and term the law of the place of contracting *lex loci actus*, a misleading terminology.

<sup>112</sup> See NIEMEYER, Das IPR. des BGB. 113 against Clunet 1891, 1026.

where it may casually happen to have been signed.”<sup>113</sup> Finally, the rule very often has been rendered meaningless by asserting the *lex loci contractus* to be the general rule and, in the same breath adding that when performance is due in another state, the law of the latter state governs.<sup>114</sup> This amounts to a pure recognition of the *lex loci solutionis*.

### III. LAW OF THE PLACE OF PERFORMANCE

#### I. Historical Note

Savigny and his school<sup>115</sup> substituted the law of the place where the contract is to be fulfilled for that where it is concluded. They believed that the Roman jurists agreed with their view, and argued that in contrast with the accidental nature of the locality of contracting, the parties carefully determine the details of performance. It is true, indeed, that business stipulations, in connection with usage, make it ordinarily clear where goods or services are to be delivered and received. This place, the authors emphasize, is of paramount importance for the structure of the contractual relationship, and foremost in the interest and “expectation of the parties.”

Story had paved the way to this consideration. Although he upheld the tradition that “the validity of a contract is to be decided by the law of the place where it is made (§ 242), which proposition he based on the presumed intention of the parties, he added:

“But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is,

<sup>113</sup> Thomson-Houston Electric Co. v. Palmer (1893) 52 Minn. 174, 179, 53 N. W. 1137, 1138, quoted by McCLINTOCK, 10 Minn. L. Rev. (1926) 498, 501.

<sup>114</sup> STORY § 280; cf. LORENZEN, 30 Yale L. J. (1921) 667; *infra* this page.

<sup>115</sup> SAVIGNY § 370; 2 BAR 9; UNGER, 1 System 179; DERNBURG, 1 Pandekten 105; REGELSBERGER, Pandekten 173; Saxony C. C. (1863) § 11; report by ENNECCERUS and resolution, 24 Deutscher Juristentag, 4 Verhandlungen 83, 112, 127.

in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation is to be governed by the law of the place of performance." (§ 280).

## 2. Countries

Under these influences the *lex loci solutionis* has become the firmly established subsidiary test of all contractual obligations in Germany,<sup>116</sup> and certain American and other jurisdictions.<sup>117</sup> Sometimes it is the test only for the "effects" of contracts,<sup>118</sup> and in some countries, it is imperative when contracts are to be performed within the forum.<sup>119</sup>

In British courts, this law is not an exclusive but a favorite device.<sup>120</sup>

In the countries applying the law of the place of contract-

<sup>116</sup> RG., 6th Civil Chamber, in 61 RGZ. 343; 62 RGZ. 379 under ZITELMANN's influence applied the domiciliary law of the debtor; overruled by RG. (Sept. 25, 1919) 96 RGZ. 262, (Sept. 29, 1919) *id.* 270. The fifth chamber left the question open in RG. (Dec. 18, 1920) 101 RGZ. 141, but agreed with the law of the place of performance (Dec. 7, 1921) in 103 RGZ. 259; (June 2, 1923) 107 RGZ. 44; (Oct. 3, 1923) 108 RGZ. 241. The subsequent decisions are collected by LEWALD 224 No. 281ff.; MELCHIOR, JW. 1925, 1574 n. 38.

<sup>117</sup> California: C. C. § 1646.

Montana: C. C. (1895) art. 2211, Rev. C. (1935) vol. 3 c. 108 § 7537. Chile: C. C. art. 15 § 1 (if this place is in Chile).

Greece: Formerly, C. C. (1856) art. 6.

Liechtenstein: Sachenrecht of Dec. 31, 1922, art. 17 par. 1.

Nicaragua: C. C. art. VI, 14.

Spain: CORDOVA, "El Derecho Interregional," 107 Revista Gen. Legisl. y Jur. (1905) at 20; CASTAN TOBEÑAS, 1 Derecho Civil Español, Común y Foral (ed. 6, 1943) 100.

Montevideo Treaty on Int. Civil Law (1889) arts. 32, 33; (1940) arts. 36, 37.

Saxony: Formerly, C. C. § 11.

Czarist-Russian law, see 14 Z.int.R. 31, 35.

<sup>118</sup> Louisiana: C. C. (in all editions) art. 10 par. 2.

Switzerland: (As to the "effects") BGE.: 32 II 268; 34 II 648; 36 II 6; 37 II 601; "constant practice" recognized in 47 II 541; 49 II 225; 59 II 361; cf. HOMBERGER, Obl. Verträge 41; NIEDERER, 60 Z. Schweiz. R. (N. F.) (1941) 275a.

<sup>119</sup> Brazil: Sup. Trib. Fed. (July 23, 1930) 16 Arch. Jud. 5, 99 Revista Dir. 287, based on C. Com. art. 628. On the literature, see 2 PONTES DE MIRANDA 192ff.

Argentina, Chile, Mexico and others, see *supra* Chapter 28 n. 43 and Chapter 29 n. 33.

<sup>120</sup> WESTLAKE 300 § 211; DICEY 673; BATIFFOL § 99.

ing on the basis of a presumption, such as France and Italy, counterevidence is allowed to prove that the intention of the parties veered to the law of the place of performance.

*United States.* In striking contrast to the Restatement, Lorenzen has concluded from the cases that "most of them apply the law of the place of performance when it differs from that of the place of contracting, without reference to the other surrounding circumstances."<sup>121</sup> In a recent inquiry the French scholar, Batiffol, confirms this view. He thinks the American courts have given Story's text an adequate and successful interpretation by adopting the *lex loci solutionis*, if at the time of the contract the place of fulfillment was already determined in the mind of the parties.<sup>122</sup> Such statements, of course, provide us merely with a starting point in a complicated inquiry.

### 3. Mode of Fulfillment

Irrespective of the law applying to the rest of the contract, the law of the place of performance is firmly entrenched as governing the "mode and incidents,"<sup>123</sup> or "modalities" of payment or other performance, if no contrary intention is proved.<sup>124</sup> This universal rule includes the application of the *lex situs* to the transfer of real or personal property as object of an obligation, and of the local law to the precise place, time, and manner of tender and delivery. Judge

<sup>121</sup> LORENZEN, 30 Yale L. J. (1921) 565, 578.

<sup>122</sup> BATIFFOL 89.

<sup>123</sup> Jacobs, *Marcus & Co. v. The Crédit Lyonnais* (1884) 12 Q. B. D. 589, 604 per Bowen, L. J.; Lord Wright in *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A. C. 122, 151; *Auckland City Council v. Alliance Assurance Co., Ltd.* [1937] A. C. 587, 606.

<sup>124</sup> BOULLENOIS, 2 *Traité de la personnalité et de la réalité des loix* (1766) 500; 1 FOELIX 233; 2 BAR 21, 88; WEISS, 4 *Traité* 387; FOOTE 399, 477; and all other writers with the only exception of PILLET, 2 *Traité* 181 § 486.

Austrian Allg. BGB. § 905: "With regard to measure, weight and kind of money, the place of delivery is determinative." Former Italian C. Com. art. 58, as commonly construed, see, e.g., Cass. (June 8, 1933) *Foro Ital.* 1933.1.938.

Learned Hand once<sup>125</sup> took opportunity to enumerate American cases applying this rule with respect to a moratorium,<sup>126</sup> payment upon a forged endorsement,<sup>127</sup> delivery of a note as payment,<sup>128</sup> payment in one currency or another,<sup>129</sup> the question who is the proper payee<sup>130</sup> or consignee,<sup>131</sup> and time of grace on commercial papers.<sup>132</sup> The international literature and practice agree in subordinating to this law: the tender of goods and services, the duty of the creditor to deliver a receipt, the currency in which a money debtor may be compelled to pay the amount due, for example what "franc" or "pound" means if it is also a money unit at the place of performance,<sup>133</sup> and like questions of weights, measures, working days, and business hours.<sup>134</sup>

*Illustration.* Two merchant firms in Capetown arranged with a bank of the same city credits for buying flour in the United States. The bank promised to honor the seller's draft upon them at its New York branch, provided that the bills of exchange were accompanied in one case "by bill of lading and insurance policy," and in the other "by full set of shipping documents including marine and war risk

<sup>125</sup> *Louis-Dreyfus et al. v. Paterson Steamships, Ltd.* (1930) 43 F. (2d) 824, 827. The following citations have been adduced by Judge Hand himself.

<sup>126</sup> *Rouquette v. Overmann* (1875) 10 L. R. Q. B. 525.

<sup>127</sup> *Kessler v. Armstrong Cork Co.* (C. C. A. 2d 1907) 158 Fed. 744; *Belestin v. First Nat'l Bank* (1914) 177 Mo. App. 300, 164 S. W. 160.

<sup>128</sup> *Tarbox v. Childs* (1896) 165 Mass. 408, 43 N. E. 124; *Gilman v. Stevens* (1896) 63 N.H. 342, 1 Atl. 202.

<sup>129</sup> *Anonymous* (1784) 1 Brown Ch. C. 376; *Benners v. Clemens* (1868) 58 Pa. 24.

<sup>130</sup> *Graham v. First Nat'l Bank of Norfolk* (1881) 84 N. Y. 393, 38 Am. Rep. 528.

<sup>131</sup> *Yokohama Specie Bank, Ltd. v. U. S. Fidelity & Guaranty Co.* (1923) 123 Wash. 387, 212 Pac. 564; rehearing, 216 Pac. 851.

<sup>132</sup> *Bowen v. Newell* (1855) 13 N. Y. 290, 64 Am. Dec. 550.

<sup>133</sup> See *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.* [1938] A. C. 224—P. C., per Lord Wright, and in case of a stipulation to the contrary effect, *De Bueger v. Ballantyne & Co.* [1938] A. C. 452—P. C.

<sup>134</sup> In Germany the law of the place of performance is applied to these questions as incident to its general scope, see 6 RGZ. 132; 96 *id.* at 272; 106 *id.* at 61; RG. (April 22, 1922) Warn. Rspr. 1922, No. 57.

policies for merchandise shipped to Capetown." The South African court presumed that the parties intended to have American law govern the question what documents the bank was obliged to tender with the drafts in performance of the contract.<sup>135</sup>

The exact scope of this minimum application of the *lex loci solutionis*, however, will need investigation by detailed discussion. It is a mistake to extend the *lex loci solutionis* when it is not the law governing the entire contract to the currency problems determining the quantity of money to be paid.<sup>136</sup> This is a part of the substance of the contractual obligation, and the same should be recognized as to the persons by whom or to whom performance shall be made, sufficiency of tender, and excuses for nonperformance. The Restatement (§ 358) assigning these problems to the law of the place of performance, although it forcibly subjects the nature and extent of the duty for the performance and the time of performance to the *lex loci contractus*, has established a unique and untenable proposition.

#### 4. Several Places of Performance

Savigny conceived that a contract may embrace several duties each to be fulfilled at a separate place. He meant to apply the law of each place respectively.<sup>137</sup> Windscheid<sup>138</sup> and Bar<sup>139</sup> formed their own variants of this theory which has since been consistently observed by the German Supreme Court.<sup>140</sup> In particular, where bilateral contracts are not by

<sup>135</sup> *Standard Bank of South Africa, Ltd. v. Efroiken and Newman* (1924) S. A. L. R. App. D. 171, 176, 178, 196.

<sup>136</sup> See for the present, 2 ZITELMANN 396; LEONHARD, *Erfüllungsort und Schuldort* 92; MELCHIOR § 192; MANN, *The Legal Aspects of Money* (1938) 250.

<sup>137</sup> SAVIGNY 200, 202, § 369.

<sup>138</sup> WINDSCHEID, 1 *Pandekten* § 35 No. 3.

<sup>139</sup> 2 BAR 15.

<sup>140</sup> Cases collected by LEWALD 246-256.

intention assigned to some unitary law, the obligation of either party is determined by the law of the place where he is obliged to perform. A part of the writers have been resigned to this splitting of the contract.<sup>141</sup> The Swiss Federal Tribunal espoused the theory,<sup>142</sup> and Dicey extended his advocacy of the *lex loci solutionis* to this application of two substantive laws.<sup>143</sup>

To exemplify the effect of this "splitting theory" or "two laws system" on the most important contract, sales of goods, in the absence of a presumed intention of the parties, the obligations of seller and buyer are to be distinguished, as well as their several duties. A separate place of performance may exist, and hence a different law apply to the seller's duties to deliver the goods, to be liable for warranties and conditions,<sup>144</sup> or default,<sup>145</sup> and to replace defective merchandise.<sup>146</sup> Again, the existence and effect of the various duties of the buyer depend on the laws at the places where he has to pay the price and accept the goods,<sup>147</sup> accept a substitute,<sup>148</sup> examine the goods, and give notice.<sup>149</sup> But also the remedies

<sup>141</sup> See LEWALD 246. Also the writers advocating the law of the nationality or domicile of the debtor are satisfied with a similar bisection, see *infra* n. 175.

Switzerland: BECKER, 5 Gmür 294 § 312 V n. 20; 304 §§ 319-362 II n. 2.

<sup>142</sup> BG. (Oct. 31, 1908) 34 BGE. II at 648; (Oct. 22, 1915) 41 BGE. II at 594; HOMBERGER, Obl. Verträge 48; Reports to the Swiss Lawyers' Ass'n, by NIEDERER, "Die Spaltung des Vertrages," and KNAPP, "La division des effets du contrat," etc., 60 Z. Schweiz. R. (N. F.) (1941) 221a-354a.

<sup>143</sup> DICEY 675.

<sup>144</sup> RG. (Oct. 21, 1899) JW. 1899, 751; OLG. Hamburg (April 14, 1905)

12 ROLG. 58, 16 Z.int.R. 322.

<sup>145</sup> RG. (Jan. 21, 1908) Leipz. Z. 1908, 308; (Apr. 1, 1930) 84 Seuff. Arch. 252; OLG. Hamburg (Oct. 24, 1912) Hans. GZ. 1913, HBL. No. 20; (Jan. 4, 1918) JW. 1918, 380.

<sup>146</sup> RG. (April 19, 1910) 73 RGZ. 379, Revue 1911, 403.

<sup>147</sup> RG. (Nov. 18, 1899) JW. 1900, 12 No. 5; OLG. Jena (Dec. 31, 1917) JW. 1918, 380 No. 5, stressing the local connection of each litigious obligation; cf. 55 RGZ. 423; 65 *id.* 332. Similarly, as to the portions to which each of several buyers is obligated, OLG. Jena (June 30, 1897) 8 Z.int.R. 335, Clunet 1899, 608.

<sup>148</sup> RG. (Oct. 13, 1894) 34 RGZ. 191.

<sup>149</sup> RG. (April 28, 1900) 46 RGZ. 193, 195; (April 19, 1910) 73 RGZ. 379; (Feb. 4, 1913) 81 RGZ. 273, 275; for details, see LEWALD 254 ff. Accord-

a buyer has on the ground of defects<sup>150</sup> and nondelivery,<sup>151</sup> have been subordinated to the law determinative of the obligation to pay.

These and other scholastic and unsound results have been harmful to the reputation of *lex loci solutionis*.<sup>152</sup>

German courts themselves have become uneasy of this artificial play and admittedly try hard to avoid it in particular cases by presuming an intention of the parties in favor of an all-inclusive law.<sup>153</sup> The Swiss Supreme Court seems to deny to the adopted principle almost any practical influence.<sup>154</sup>

In fact, this principle is based on the mistaken conception that a bilateral contract can be reasonably partitioned into two unilateral obligations. This conception may be excused in earlier stages of Roman and English jurisprudence; it was largely superseded by the late Roman law, and has been entirely abandoned in modern law. The very nature of a *synallagma* is ignored when a sales contract is torn up into halves belonging to different legislations. No wonder that recent criticism has discovered a number of contradictions and inconveniences, and has stated that rescission of a contract<sup>155</sup> and risk for fortuitous loss of the goods<sup>156</sup> cannot be classified properly, and that in truth the alleged law of one party was applied to both.<sup>157</sup>

ing to OLG. München (Feb. 16, 1928) IPRspr. 1928 No. 33, the duty of notice is subject to the law of the domicile of the buyer.

<sup>150</sup> RG. (June 16, 1903) 55 RGZ. 105; (April 26, 1907) 66 RGZ. 73; (May 25, 1932) IPRspr. 1932 No. 33.

<sup>151</sup> RG. (May 27, 1924) IPRspr. 1926/27 No. 43.

<sup>152</sup> See citations *infra* n. 169. See also FIORE § 120; PILLET, 2 *Traité* 263 (against Savigny's emphasis on the place where jurisdiction will be taken); ALCORTA, 2 *Der. Int. Priv.* 314; MATOS 457 § 330. For other difficulties, see LEWALD § 284.

<sup>153</sup> RG. (April 4, 1908) 68 RGZ. 203, 207; (Jan. 27, 1928) 120 RGZ. 72.

<sup>154</sup> NIEDERER, 60 *Z. Schweiz. R. (N. F.)* (1941) 260a-265a; see also GUTZWILLER, *id.* 415a; *adde* BG (Oct. 21, 1942) 68 BGE. II 220, 223.

<sup>155</sup> To this effect already ROHG. (Dec. 9, 1875) 19 ROHGE. 132.

<sup>156</sup> See NEUNER, 2 *Z. ausl. PR.* (1928) 121; LEWALD 249 No. 309; RABEL-RAISER, 3 *Z. ausl. PR.* (1929) 77.

<sup>157</sup> NEUNER, *id.* 123.



The Anglo-American courts seem never to have thought of such consequences of the place of performance theory, and with the exception of Dicey,<sup>158</sup> no writer has entirely followed the German example.

If, however, we become aware that not the several duties but the whole contract is to be connected with the law of some state, it must also be realized that by making the "place of performance" the determinative concept, we are far from meaning the domestic concept bearing the same name. Indeed, in progressive suggestions the whole of the contract has been localized at the place where the *typically*<sup>159</sup> prevailing, or *principal*,<sup>160</sup> contractual duty should be discharged.<sup>161</sup> It has also been suggested that a new uniform concept of place of performance should be established for the entire contract rather than for the duties created by it.<sup>162</sup> But even this may turn out to be too narrow a formula. Another step farther, Strisower has advocated that the place of performance should be deemed to be found, not at the place where performance ought to be made in fact but the place where, according to the nature of the obligation, the "social sphere is centered in which the obligation is to be discharged."<sup>163</sup> More simply we should say that the center of the obligation rather than the place of its discharge is the adequate contact for choice of law.

To take an example, it is an excellent rule that employment contracts should be governed by the law of the place where the employee is expected to do his work. This rule is

<sup>158</sup> See *supra* n. 143.

<sup>159</sup> HOMBERGER, Obl. Verträge 49, 50; BG. (Oct. 21, 1941) 67 BGE. II 181.

<sup>160</sup> NOLDE, 32 *Annuaire* (1925) 504; LEWALD 248; for other literature, see BATIFFOL 83 and *infra* p. 472 n. 169.

<sup>161</sup> In the opinion of BATIFFOL 87, this is the existent rule in the United States.

<sup>162</sup> NEUNER, 2 *Zausl.PR.* (1928) 130; followed by NIEDERER, 60 *Z. Schweiz. R. (N. F.)* 242 a; OSER-SCHOENENBERGER p. LVII No. 57.

<sup>163</sup> STRISOWER, 32 *Annuaire* (1925) 507.

amenable to the theory emphasizing the place of performance of the outstanding obligation established in such a contract. But whoever would be satisfied with this aspect of the rule must be embarrassed by the case of a traveling salesman visiting a dozen states according to the varying instructions of his employer. Again, there is prevailing agreement that in this latter case the law of the employer's domicile governs. In both cases, however, the selected localizations are convenient for determining the center of the particular type of contract.

### 5. Lack of a Certain Place of Performance

It does not often happen in normal commercial sales, loans, or bailments that the parties are unable to ascertain at the time of contracting at what place the duties are performable. When, however, insurance payments or life rents are made payable at the domicile of the creditor, his changes of domicile are decisive. Bonds may be payable in any of several countries at the option of the bondholder. Goods may be shipped to a destination to be declared during the carriage. Or a vessel, plying on the ocean, is bought with the stipulation that it should be conveyed to the purchaser at its next port of call.<sup>164</sup> As mentioned before, in such cases it has been suggested that as a measure of despair, the *lex loci contractus* may be applied. Resorting to a more logical method, courts regarding the *lex loci contractus* as starting point, sometimes will say that where there is no one place of performance, the court cannot do better than fall back on the general rule that *lex loci contractus* governs.<sup>165</sup> The 1940 draft of Montevideo (art. 40), expressly provides that if the parties cannot, at the

<sup>164</sup> Case referred to by 2 BAR 10 n. 9.

<sup>165</sup> See for instance, *Morgan v. New Orleans M. & T. R. Co.* (1876) 2 Woods 244, 17 Fed. Cas. 754 No. 9804; *Oakes v. Chicago Fire Brick Co.* (1941) 388 Ill. 447, 58 N. E. (2d) 460. The main advocate of this rule at present is BATIFFOL 85 § 94.

time of contracting, determine the place of fulfillment, the contract is governed by the law of the place of contracting.

All these are makeshift constructions.

## 6. Characterization

Courts have been taught to determine the place of performance according to their *lex fori*. The German Reichsgericht strictly observing this method, considers neatly two successive phases, first inquiring where the German municipal law<sup>166</sup> locates performance, in order to find the applicable law; and when this law is found, inquiring where performance is due under this law, in order to decide the claim.<sup>167</sup>

*Illustration.* D in Zürich, Switzerland, owes money to C in Berlin. Under the German Civil Code, § 270, the debtor has to send the money at his own cost and risk to the creditor, but nevertheless Zürich is his "place of performance." This means that if the mail is delayed en route, he is not in default (78 RGZ. 140). But applied to the conflicts matter, it means that Swiss law governs the debt. Consultation of the Swiss Code of Obligations will result in finding that the place of performance is with the creditor in Berlin. Therefore, by delayed mail the debtor is in default after all, therefore liable for interest and in certain cases for rescission, although not for other damage. (C. Obl. art. 74 (1), 106 ff.)

The Swiss Federal Court, professing the same method, if consistent, must reach the opposite result in favor of German law.<sup>168</sup> This is a wonderful example to demonstrate Bartin's

<sup>166</sup> BGB. §§ 269, 270. Many German writers following LEONHARD, Erfüllungsort und Schuldort (1907), however, refer these sections directly to conflicts law. MELCHIOR 171 virtually concludes from this view that the courts have no choice other than to apply them.

<sup>167</sup> ROHG. (1875) 17 ROHGE 292; (1877) 22 *id.* 296; RG. (March 11, 1919) 95 RGZ. 164, and constant practice, see MELCHIOR 172 n. 1, 173 n. 2.

<sup>168</sup> The Swiss Fed. Trib., in fact, resorting to *lex fori* for defining the place of performance in its decision (Oct. 11, 1918) 44 BGE. II 416, 417 applied the law of the creditor's Swiss domicil, but applied the domiciliary law of the

thesis that harmony is impossible. But more and more, we may wonder whether any "place of performance" can fulfill its pretended function.

## 7. Rationale

The opinion is well-reasoned that performance has in many cases more significance in the eyes of parties to a contract than the locality where they declare their consent, if such a common locality exists. However, the former enthusiasm for this variant of the old doctrine has not stood up against accumulated criticism.<sup>169</sup> The place of performance may happen to be as accidental or insignificant for choice of law as any other place involved; as when an English and an American merchant engage in a transaction to ship meat from Argentina to Egypt; or Americans agree with one another for sea carriage to Venezuela; or when a traveling salesman is hired to go to distant countries.

Such fruits of the theory of place of fulfillment resulting in bisection of bilateral contracts are particularly objectionable. They cannot be removed by a fictional pretension that a contract producing two main obligations of different location, has only one place of performance. The relations between creditor and debtor are often necessarily localized at more than two places. Conflicts law cannot schematically rely on such a device.<sup>170</sup>

*Lex loci solutionis* without more qualification, is as insufficient a test as the *lex loci contractus*.

debtor, being again Swiss law in BG. (July 3, 1909) 35 BGE. II 473, 476, 20 Z.int.R. 102. Thereby it managed both times to apply the law of the forum.

<sup>169</sup> See 2 BAR 11; 2 MEILI 8; 2 ZITELMANN 372; ROGUIN, Actes de la 3ème Conférence de la Haye (1900) 62; ALMÉN, 1 Skandinav. Kaufrecht 52; LEWALD 226, 227.

<sup>170</sup> F. LEONHARD, Erfüllungsort und Schuldort 123 has very well noted this point.

## IV. LAW OF THE DEBTOR'S DOMICIL

A subsidiary rule based on the *nationality* of the debtor, postulated on a priori axioms,<sup>171</sup> has been commonly rejected.<sup>172</sup> But the law of the *domicil* of the debtor functioning as a general rule, has found increasing favor with writers.<sup>173</sup> The principal arguments are that a debtor cannot be presumed to have promised more than his habitual law makes him liable for, and that his domicil is the place where he may be sued and his assets are legally concentrated, according to the most fundamental principles of jurisdiction and enforcement. That in most cases he is in fact sued at that forum and the domiciliary law then coincides with *lex fori*, is claimed to be another advantage.

Adversaries<sup>174</sup> object that the domicil of the debtor has no title to govern acts of performance in another country, and that there is no reason why the domicil of the debtor should be of more significance than that of the creditor. The dismemberment of a bilateral contract seems even more difficult to avoid with this than with the doctrine of the place of performance; the advocates of the personal law realize this and approve of the splitting.<sup>175</sup> Where a buyer refused payment, while another buyer paid the price in advance, and both rescind, there develop curious differences between the applicable laws, because the second purchaser has changed

<sup>171</sup> 2 ZITELMANN 372; 2 FRANKENSTEIN 126.

<sup>172</sup> RG. (March 11, 1919) 95 RGZ. 164; (Oct. 3, 1923) 108 RGZ. 243; E. ISAY, 14 Z. f. Völkerrecht (1928) 254.

<sup>173</sup> 2 BAR 12; REGELSBERGER, Pandekten § 44 n. 4; HARBURGER in 22 Annuaire (1908) 114; NEUMEYER in 32 Annuaire (1925) 99 No. 3; STRISOWER in *id.* 91, *cf.* 135; GUTZWILLER 1608 n. 1; LEWALD 230 No. 287; FRITZSCHE, 44 Z. Schweiz. R. (N. F.) 254a; RAAPE, D. IPR. 263 (regarding this theory as probably dominant in the German literature); ALMÉN, 1 Skandinav. Kaufrecht 54 n. 68 citing other Swedish followers.

<sup>174</sup> See LORENZEN, 30 Yale L. J. (1921) at 667; BATIFFOL 100.

<sup>175</sup> It has been adopted by 2 ZITELMANN 405; MITTEIS, 4 Verhandlungen des 24. Deutschen Juristentages 98; 2 FRANKENSTEIN 190, 295ff.; NEUMEYER, IPR. (1929) 27; BAGGE, Conférence de la Haye, Actes de la sixième session, at 289.

his position from debtor to creditor.<sup>176</sup>

In legislation<sup>177</sup> and courts,<sup>178</sup> this approach has not had much following. Lacking the historical background of the *leges loci contractus* and *loci solutionis*, it has no better rational justification than these for dominating by itself all contracts.

It is another matter that the domicil of a party, being the basis of his status, has been said to furnish a last resort, if the requirements of all other conflicts rules fail. In this respect, we shall discuss<sup>179</sup> cases such as that of a merchant who sends out a catalog intending, under his domiciliary law, to invite customers to make offers, while at the places of receipt the catalog is regarded as an offer; or cases concerning the different appreciation of silence as acceptance or denial of an offer.

#### V. THE LAW MOST FAVORABLE TO THE CONTRACT

Inspired by earlier theories, the Austrian Code of 1811 has a special rule referring to the personal law of a foreigner making a gift within the country, if the gift is valid under such law rather than under the otherwise applicable *lex fori*.<sup>180</sup> Argentina<sup>181</sup> and Nicaragua<sup>182</sup> conversely provide for application of their own laws, when they are more fa-

<sup>176</sup> ALMÉN, 1 Skandinav. Kaufrecht 55, vainly tries to justify this difference.

<sup>177</sup> Poland: Int. Priv. Law, art. 9 (as to unilateral contracts); applied to loans, Polish S. Ct. (Nov. 18, 1936) 4 Z.osteurop. R. (N. F.) (1937-38) 380.

<sup>178</sup> German-Rumanian Mixed Arb. Trib., Negreanu v. Meyer (June 16, 1925) 5 Recueil trib. arb. mixtes (1927) 200, 213; Anglo-German Mixed Arb. Trib., Büsse v. Brit. Mfg. Stationary Co. (1927) 7 Recueil trib. arb. mixtes (1928) 345, JW. 1928, 2047; cf. RABEL-RAISER, 3 Zausl.PR. (1929) 62.

Denmark: Supreme Court, Norsk Retstidende 1928, 646 and 826, *id.* 1934, 152; see 7 Zausl.PR. (1930) 946, 942; 10 *id.* 632; see also BORUM-MEYER, 6 Répert. 224 Nos. 78, 79.

Norway: CHRISTIANSEN, 6 Répert. 578 No. 146.

Sweden: MALMAR, 7 Répert. 136 No. 105.

<sup>179</sup> See *infra* Chapter 32, p. 522 n. 19.

<sup>180</sup> Allg. BGB. § 35; cf. Prussian Allgemeines Landrecht I 5 § 113 (applied by RG. (March 15, 1900) 46 RGZ. 230 to the form of a gratuitous discharge).

<sup>181</sup> Argentina: C. C. art. 14 (4).

<sup>182</sup> Nicaragua: C. C. art. VIII No. 4.

avorable to the validity of transactions than the foreign laws called for by the conflict rules. In England and America, Lord Phillimore's words have often been repeated that "the parties cannot be presumed to have contemplated a law which would defeat their engagements"—an application of the maxim, *ut res magis valeat quam pereat*.<sup>183</sup> Mr. Justice Matthews speaking for the Supreme Court of the United States appropriated this consideration as

"... a circumstance highly persuasive in its character of the presumed intention of the parties and entitled to prevail unless controlled by more express and positive proofs of a contrary intent."<sup>184</sup>

The illustrative English cases using this argument involve an arbitration clause, valid under English law at the place of making, invalid under the Scotch law of the place of performance,<sup>185</sup> and clauses exempting a ship company from liability.<sup>186</sup> Similar stipulations of carriers<sup>187</sup> and of some insurance companies<sup>188</sup> have been treated to the same effect in this country. The Supreme Court of the United States has applied it to a bond void for lack of consideration where made but valid where to be performed.<sup>189</sup> One case concerns the capacity of a married woman,<sup>190</sup> two others, oral

<sup>183</sup> 4 PHILLIMORE § 654; followed by WHARTON § 429; obiter dictum in *South African Breweries, Ltd. v. King* [1899] 2 Ch. 173, 181.

<sup>184</sup> *Pritchard v. Norton* (1882) 106 U. S. 124, 137.

<sup>185</sup> *Hamlyn & Co. v. Talisker Distillery* [1894] A. C. 202; 6 R. 188—H. L.

<sup>186</sup> *Peninsular and Oriental Steam Navigation Co. v. Shand* (1865) 3 Moo. P. C. Cas. (N. S.) 272, 290; *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321.

<sup>187</sup> *Hazel v. Chicago, Milwaukee & St. Paul R. Co.* (1891) 82 Iowa 477, 48 N.W. 926; *W. A. Ryan & Co. v. Missouri, K. & T. R. Co.* (1885) 65 Tex. 13 (citing numerous precedents); *Atchison, Topeka & Santa Fe R. Co. v. Smith* (1913) 38 Okla. 157, 132 Pac. 494.

<sup>188</sup> *Coffin v. London & Edinburgh Ins. Co.* (1928) 27 F. (2d) 616. Arkansas cases, cited by Leflar, *Arkansas Conflict of Laws* 213 n. 48.

<sup>189</sup> *Pritchard v. Norton* (1882) 106 U. S. 124.

<sup>190</sup> *Greenlee v. Hardin* (1930) 157 Miss. 229, 127 So. 777, 71 A.L.R. 741; as a most subsidiary argument in *Hauck Clothing v. Sophie Sharpe* (1899) 83 Mo. App. 385.

transactions.<sup>191</sup> The argument has more often been used in usury cases,<sup>192</sup> although even there in less than twenty-five per cent of the cases,<sup>193</sup> and occasionally with respect to other causes of illegality.<sup>194</sup> A few instances of analogous reasoning exist in decisions of other countries.<sup>195</sup>

On the other hand, neither in England<sup>196</sup> nor in this country<sup>197</sup> can any consistent judicial doctrine be stated in this sense. Often the argument was unnecessary and served to support the escape from *lex loci contractus*<sup>198</sup> or *lex loci solutionis*.<sup>199</sup> In the cases concerning capacity, favor of validity would seem adequate but has hardly ever been openly and decisively granted.

Nevertheless, it provokes thought that the preference of the more favorable law has found considerable support in the literature, particularly in this country.<sup>200</sup> What can theo-

<sup>191</sup> Hubbard v. Exchange Bank (C.C.A. 2d 1896) 72 Fed. 234, *cert. denied* 163 U. S. 690 (verbal acceptance of a bill of exchange); D. Canale & Co. v. Pauly and Pauly Cheese Co. (1914) 155 Wis. 541, 145 N. W. 372.

<sup>192</sup> *Supra* p. 409.

<sup>193</sup> This has been stated by BATIFFOL 198 § 222; see (n. 1) his revision of cases cited by 2 BEALE 1157 n. 2.

<sup>194</sup> Exemption of liability of railway: Atchison, Topeka & Santa Fe R. Co. v. Smith (1913) 38 Okla. 157, 132 Pac. 494, but the argument is unnecessary, *supra* p. 419. Intention of the parties is the main reason, as in Coffin v. London & Edinburgh Ins. Co. (D.C.N.D. Ga. 1928) 27 F. (2d) 616 (insurance).

<sup>195</sup> E.g., RG. (March 13, 1928) IPRspr. 1928 No. 1.

<sup>196</sup> CHESHIRE 269 cites Maritime Assurance Co. v. Assecuranz-Union von 1865 (1935) 52 Ll. L. Rep. 16.

<sup>197</sup> BATIFFOL 139 §§ 157, 158. [*Adde* the thoughtful observations by PAUL A. FREUND, "Chief Justice Stone and the Conflict of Laws," 59 Harv. L. Rev. (1946) 1210, 1212-1218.]

<sup>198</sup> E.g., Hubbard v. Exchange Bank, *supra* n. 191; Brierley v. Commercial Credit Co. (1929) 43 F. (2d) 724.

<sup>199</sup> E.g., Canale v. Pauly, *supra* n. 191.

<sup>200</sup> LORENZEN, 31 Yale L. J. (1921) 53: the contract is valid if the law of any state with which the contract has *substantial connection* is complied with and execution is not prohibited by some stringent policy of the place of contracting and performance is legal at place of performance. (On these three provisos see *supra* Ch. 29); STUMBERG 212, 214: "To apply the law which will uphold the contract, if the contract has *some bona fide substantial connection* with the place of that law, would, it is believed, in carrying out the purpose which the parties had in view in their negotiations, better serve business



retically justify such a view? How could it be formulated?

In its nature, distinctly emphasized by the English writers, the selection of the validating law has been dependent upon the assumed intention of the parties. Indeed, the argument demands not only a so-called presumptive intention but a real, though tacit, agreement of the parties; by stipulating as they did, they wanted to adopt the law under which the stipulation would be valid. But this reasoning is frustrated by the doubtless correct thesis that where the parties agree on a certain law, this law applies even though it nullifies the contract.<sup>201</sup> Batiffol, who seems to refer the doctrine in question to the hypothetical intention of the parties, is only prepared to regard it legitimate, where, at the time of the contract or at least before one of them invokes nullity, the parties knew that one law annuls and the other validates their stipulation, and expressed their knowledge by their conduct.<sup>202</sup> But the cases state at most that the parties may be supposed to have known the law. Cheshire has abandoned the whole idea.<sup>203</sup>

If the proper law theory is rejected, what should be the idea, or the content, of the rule? We have seen that no rule exists prescribing that a contract is void, if it is contrary to any one of several laws "substantially" connected with it. On the other hand, could a rule be really acceptable, which says that whenever a contract is connected with several jurisdictions, we cannot hold it void except when its nullity is assured by all of them? Certainly not.

In reality, the casual popularity of the law upholding the contract in the American courts is very closely related to their unprincipled conflicts practice. On the one hand, rules are allegedly traditional and fixed; a court believes to a

convenience by making their acts legally that which they purport to be; i.e., an enforceable promise."

<sup>201</sup> *Infra* Chapter 32.

<sup>202</sup> BATIFFOL 138 § 156.

<sup>203</sup> CHESHIRE 269, as compared with ed. 1, 196.

certain extent in the *lex loci contractus* or in another device. On the other hand, nothing is really certain; the courts experiment; they are benevolent to a party who appears to deserve protection; they do not want, in particular, to allow a right to be frustrated by a local statute, either outmoded or having no reasonable claim to govern exclusively an interstate transaction. Very clearly, the courts in general do not favor the peculiarities of state provisions on Sunday contracts, statute of frauds, usury, or the formalities of insurance policies. The Wisconsin Supreme Court, speaking of a sale made in its own territory without a memorandum in writing, discards the law of the place of contracting and its rule of unenforceability, stating there is "nothing inherently bad about such convention, despite our statute of frauds," and the contract is declared valid under the foreign law of the place of performance.<sup>204</sup> The usury cases, a very particular phenomenon, are inspired by mutual tolerance as there are many ways to solve the problem. The courts desire to free legitimate business from dispensable local impositions. A finance corporation has carried on its loan business for fifteen years, has used the same type of stipulations as other companies, for customers in all jurisdictions. Why should such a usual and standard form be stigmatized as fraudulently evading the law of the debtor's domicile or the law of the forum?<sup>205</sup> The courts manifestly think that one system of regulating the rates of interest is as good as another. They weigh and compare the needs and policies. Their final choice is not so much meant to favor the validity of the contract as to encourage the reliance of trade and commerce on interstate protection. The solution would be strictly contrary, if a prohibition were violated comprising a basic requirement in a state to which the contract should exclusively belong.

<sup>204</sup> Canale v. Pauly, *supra* n. 191.

<sup>205</sup> Manufacturers Finance Co. v. B. L. Johnson & Co. (1931) 15 Tenn. App. 236.

These considerations include several particular circumstances, which do not often occur in international transactions and even in the relations among the American sister states strongly restrict the application of the principle in question. Equivalence and comparative unimportance of local policies is one of these considerations. Another is the equivalence of various conflicts rules to be used at pleasure. A third is the neglect of party choice by both courts and parties, and a fourth the replacement of one determined applicable law by a number of laws among which any one may be selected. This orbit of legal systems is circumscribed by the fortuitous connections the parties establish. But to prevent the parties from too much arbitrariness, it is required that they observe some limits which, in general, are not defined more closely. Only one limit has been settled in the usury cases: the law of the charter state of the lending corporation is excluded, if the actual place of business is elsewhere. Hence, if a court should find that the system of differentiated rates of interest in the charter state is superior to the statutes of the debtor's domicil as well as to those of the actual business place and the situs of a mortgage, it still would not be allowed to apply that law even though the parties may have expressly stipulated for it.

After all, it is not incidental that the principle of the upholding law has not seriously been applied to the bulk of the American contracts cases, not to speak of the international practice.

In the opinion of the writer, the advocates of this principle seem to feel quite correctly that something is needed, in the chaos of uncertain and unsatisfactory conflicts rules, to obviate the sacrifice of honest commerce. The spontaneous inclination of courts to safeguard contracts from local prohibitions serves as an excellent emergency device, and as such is to be recommended. If every type of contract were to be endowed with a stable subsidiary conflict rule adequate to

the nature of the contract, and if the parties were plainly permitted and encouraged to select the governing law, with assurance that it will be applied, neither the parties nor the courts would be in need of such subterfuges; and the legislatures would not have to tolerate them.

## VI. RENVOI

If a court presumes that the parties have had a certain law "in view," it is reasonable to think that this law is a substantive, municipal, law.<sup>206</sup> But also if judges are supposed to choose a law amenable to the character of the contract, it seems a useless detour to select a conflicts law instead of a municipal law.<sup>207</sup> Only in case a mechanical rule points to the law of a certain place whereas the court of this place would instead apply a third law, does renvoi have its usual significance. This is the reason why German courts have repeatedly resorted to references from the law of the place of performance to another law,<sup>208</sup> or in suits for carriage by sea, from the law of the port of discharge to the law applied at this port.<sup>209</sup> In a case where two Austrian nationals living in Turkey entered into a contract of employment, the Italian Supreme Court applied their common national law and, by transmissive renvoi from the Austrian conflicts rule, the law of Turkey.<sup>210</sup>

## VII. CONCLUSIONS

### 1. Specialized Rules

The negative result reached by some modern authors is unimpeachable. No one conflicts rule can serve for all obliga-

<sup>206</sup> MELCHIOR 239, citing OLG. Kolmar (May 19, 1893) 4 Z.int.R. 151.

<sup>207</sup> See MELCHIOR, JW. 1925, 1571 and HAUDEK 94 against LEWALD 206.

<sup>208</sup> RG. (Jan. 23, 1897) 38 RGZ. 140, 146; (Oct. 11, 1907) 19 Z.int.R. 222, 224, and others, see MELCHIOR 239 n. 2.

<sup>209</sup> RG. (April 4, 1908) 68 RGZ. 203, 210 (incidentally).

<sup>210</sup> Cass. (Dec. 29, 1937) 9 Rivista Dir. Priv. (1937) 228, see Vol. 1 p. 80 ns. 38 and 39.

tory contracts. A wrong method had developed when writers, enactments, and judicial decisions tried to apply either always the law of the place of contracting, or always the law of the place of performance, or always the personal law common to the parties, or that of the debtor, or always to connect the making of the contract with one place and its effects or performance with another place. All these doctrines have thoroughly failed.

A more attractive method is that of carefully investigating and following up the presumable intention of the parties. But where a real, though tacit, agreement of the parties is lacking, such quest turns into a search for the most appropriate connection between the dispositions of the parties and a territory. Clues hinting at the law the parties might have had in mind, are certainly not negligible; yet they have to be integrated into the entire circumstances.

What, however, is the positive gain of this dispute? If all mechanical rules are repudiated, does this mean that the circumstances of every single contract should be examined to find the most closely connected law? Some authors, led by their regard for the hypothetical intention of the parties, come near to such a view. Others want to recognize every substantial territorial contact. In the United States, a place has been sought where the law is most favorable to the validity of any obligation. Each of these suggestions contains valuable material. But at the same time, the viewpoint of the practical lawyer has been recently stressed by Griswold's opposition to Cook's apparently unlimited dissolution of fixed conflicts rules<sup>211</sup> and Cavers' doubt whether the negative criticism on Beale's rigidly dogmatic rules does not leave judges helpless.<sup>212</sup>

<sup>211</sup> See the reply by W. W. COOK, 21 Can. Bar. Rev. (1943) 249 and in 37 Ill. L. Rev. (1943) 418.

<sup>212</sup> CAVERS, *supra* n. 106.

This reaction is sound, not implying a reproach to the necessary clarification, but a suggestion for future policy. If we could do no better than refer the courts to their own estimates of what is in every single case the most closely connected law, or what is appropriate to the case at bar, the judges would soon fall back on their formulas.

A margin of judicial discretion, of course, must remain so as to do justice to peculiar forms of contracts and individual mentalities of parties. But roughly speaking, we need a developed system of conflicts rules on contracts, rather than just one or two rules, and we have to build it not on rules so vague as to abandon the judge regularly to his worry or fancy, nor on specifications so tight as to omit important kinds of agreements. This program requires comparative research in the municipal laws and in commercial practice with respect to each single type of contract, a work so far only partially started. Experience, however, seems to show that commerce is served by a number of standard forms, with newly devised clauses rapidly imitated throughout the world. In the vast domain of sales of goods, differences in stipulations are caused much more often by the natural differences of merchandise sold than by local or national predilection. Insurance, banking, carriage of goods contracts may be distinguished in analogous groups under rational rather than local criteria. For this and other reasons, it may be less difficult than appears at first sight to resolve the local attachments most characteristic of the individual groups of contracts.

However, that not inconspicuous pains must be taken, can be seen in the quick defeat of the proposed special rules for various contract types, in the Institute for International Law. Divergences of opinion were declared too profound, and, indeed, many members were devoted to the principle of nationality and hostile to party autonomy, prejudices which

in themselves could wreck any international enterprise. In addition the Institute stated that the matter was immature and deferred discussion for an indefinite time.<sup>213</sup> Lists as sketched in the reports to the Institute, in the Polish law, or in the Montevideo Treaty are the unconvincing product of divination rather than inquiry. Comparison of the actual choice of law decisions in the Anglo-American, French, and German courts, meritoriously begun by Batiffol, gives some very valuable suggestions but no comprehensive certainty. On the other hand, the successive drafts of conflicts rules determining sales of goods elaborated in the International Law Association and committees of the Sixth Hague Conference,<sup>214</sup> show remarkable progress. The work to be done is indeed vast. The present writer, in fact, does not believe himself able, in a lonely study, to do more than to point out a few examples and to suggest some methods of research.

## 2. The Law of the Contract

The task ahead will be to aim at ascertainment, in case the parties do not themselves choose their law, of what the main local connection is under given conditions, or to express it shortly:

*In what jurisdiction a certain type of contract is centered.*

If the elements of the contract in question allow it, its connection *with one law* is very desirable. Almost all modern writers are agreed on this point. To split the incidents in the manner of the Restatement and the Swiss Federal Tribunal, or in that of the German Supreme Court, is a grievous mistake, as was shown and will appear again later. That various obstacles that have been raised in the literature to the application of a unique law to this or that incidental problem are unfounded, will be discussed in Chapter 32.

<sup>213</sup> 33 *Annuaire* (1927) III 224ff.

<sup>214</sup> See the last draft in 7 *Z.ausl.PR.* (1933) 957.

Formalities, it is true, should be treated with some liberality (Chapter 31), while capacity should not be distinguished. In the conviction that "*dépeçage*," division, is bad and unity of contract is precious, we have been confirmed by a powerful lesson received from comparative research. The various legal systems operate with different terminologies and techniques, but in the hands of fair judges they usually work out all right and to strikingly similar ends. To maintain such satisfactory machinery, however, we have to leave to one system the entire living situation. Mixing several municipal provisions is quite likely to jeopardize justice.<sup>215</sup>

Of course, there are certain types of contracts, such as, for instance, international loans with separate issues of "*tranches*" in several countries and "payable" at several places, with respect to which it would be a forced method to ignore the several laws involved. There are also certain incidents such as the examination of goods sold and delivered, or the time and manner of payments, which are conveniently governed by special laws.<sup>216</sup> Hence, it is generally the *lex contractus*, or as we shall term it, *the law of the contract*, that must be found. By exception we have to recognize either more than one law of the contract, or in addition to this law, *a special law*.

<sup>215</sup> See Ed. WAHL, 3 Z.ausl.PR. (1929) 782.

<sup>216</sup> In continental Europe called *statut spécial*, *Nebenstatut*.



## CHAPTER 31

### Form of Contracts<sup>1</sup>

#### I. THE RULES

##### 1. *Lex loci contractus*

THE original doctrines of the statisticians included in the validity of a contract form as well as substance. Hence, the law of the place of contracting, whether considered as governing the entire contract or at least its validity, covered the formalities for completing a valid agreement, and it may be inferred that this very application has always given the principle of *lex loci contractus* its most convincing aspect. This ancient doctrine has retained its full vigor in the basic American conflicts rule which, to believe Beale, still prevails. According to the Restatement (§ 331, b), the law of the place of contracting determines the validity of a promise, as in other regards, also with respect to "the necessary form, if any, required to make a promise binding."

##### 2. *Locus regit actum*

In the main development of the statist doctrine, the significance of the maxim, *locus regit actum*, from the sixteenth century on was reduced to the problems of form.<sup>2</sup> The idea that an obligation originates in the territory of a sov-

<sup>1</sup> (The form of negotiable instruments will not be included in the following chapter, except by occasional mention, since this topic warrants a separate discussion.)

EDOUARD SILZ, *Du domaine d'application de la règle "locus regit actum"* (Paris 1933); RHEINSTEIN, 4 *Rechtsvergl. Handwörterbuch* 360-371; L. I. BARMAT, *De regel "locus regit actum" in het internationaal privaatrecht* (Amsterdam 1936).

<sup>2</sup> On the history of the rules concerning formalities, see WAECHTER, 25 *Arch. Civ. Prax.* (1842) 368, 405; SAVIGNY § 382; 1 *BAR* 337; NEUMEYER, 2 *Gemeinrechtliche Entwicklung* 84, 87, 135; E. M. MEIJERS, *Bijdrage tot de geschiedenis van het int. privaatrecht en strafrecht* (1914) *passim*.

ereign and therefore depends on the conditions imposed there, retained greater force in application to the exterior conditions of contracting than for the capacity of the parties. Others deduced the maxim from voluntary submission of the parties, or from a general customary law. But finally, writers have emphasized reasons of convenience, viz., that parties are in the best position to learn what formalities the local law prescribes and can readily adjust themselves to these; that they are not interested in other forms for their own sake; and may well be uncertain with which law they should otherwise comply.<sup>3</sup>

(a) *Compulsory rule*. The theory that a contract is "born" in a territory drew with it the logical necessity that the local prescriptions govern the form. Hence, *locus regit actum* acquired compulsory force. Whatever law may govern the contract in other respects, the law of the place where it is made always determines whether any formalities are obligatory, and if so, which are required. In this shape as imperative, the rule was recognized for a long time in England,<sup>4</sup> and appears in a number of countries.<sup>5</sup> The French courts, until

<sup>3</sup> See LEREBOURS-PIGEONNIÈRE 273 § 243; BATIFFOL 363ff. §§ 424, 425.

<sup>4</sup> *Alves v. Hodgson* (1797) 7 T. R. 241; *República de Guatemala v. Nuñez* [1927] 1 K. B. 669, 691, both leading cases concerning the want of a stamp locally required at a foreign place; WESTLAKE 281 § 209; DICEY 641 Rule 159(2); FOOTE 388.

Canada: Former Quebec practice: *Furniss v. Larocque* (1886) 2 Montreal L. R. S. C. 405 (erroneously cited by DICEY 642 n. 2 as existing law).

<sup>5</sup> Argentina: C. C. art. 12 and art. 916 (new 950), cf. 2 VICO 280-285, §§ 346-348, and cases collected by 2 Romero del Prado 306-310.

Bolivia: C. C. art. 36.

Brazil: Introd. Law (1916) art. 11; but see *infra* n. 10.

Chile: C. C. art. 17.

Colombia: C. C. art. 21.

Cuba: C. Com. arts. 51, 52.

Guatemala: Law on Foreigners, 1936, art. 24 sentence 2.

Honduras: C. C. art. 16.

The Netherlands: Allg. Bepalingen (1829) art. 10 according to the dominant opinion criticized by JITTA 138; KOSTERS 185; OFFERHAUS, "The Private International Law of the Netherlands," 30 Yale L. J. (1920) 116, but historically grounded, see BARMAT, *supra* n. 1, 157. The Supreme Court, H. R. (Dec. 6, 1928) N. J. (1929) 465 avoided a direct answer.

1909, were divided on the question.<sup>6</sup>

Transactions before consuls in foreign countries, of course, follow the forms provided by the domestic law of the consul's state.

(b) *Optional rule.* In a part of the old literature,<sup>7</sup> however, and in the course of the nineteenth century under Savigny's influence,<sup>8</sup> the rule was more and more regarded merely as a favor to the parties, as a permission to use the local formalities or formlessness.

In a first variant expressing the rule, the *lex loci contractus* was still given first place. The contract, as was said, should be valid also if complying with the law governing the contract as a whole.<sup>9</sup> Later, this order was reversed. The German Introductory Law in 1896 formulated the rule thereafter prevalent:

Art. 11(1) The form of a transaction is determined by the laws governing the legal relation that constitutes the subject of the transaction. It is sufficient, however, to observe the laws of the place where the transaction is made.

(2) The provision of paragraph 1, sentence 2, shall not

Peru: C. Com. art. 52.

Portugal: C. C. art. 24; C. Com. art. 4 (3) (doubtful).

Puerto Rico: C. C. art. 11; C. Com. art. 83 n. 2.

Rumania: Some decisions, see PLASTARA, 7 Répert. 77 No. 255.

Spain: C. C. art. 11 par. 1 (for public acts) generalized in the literature, see TRÍAS DE BES, 6 Répert. 245 No. 65 and Revue 1927, 23, 27 who recognizes only certain exceptions. *Accord*, CASTAN TOBEÑAS, 1 Derecho Civil Español (1943) 101.

Switzerland: All problems of validity are governed by the *lex loci contractus*, see *supra* p. 397 n. 16.

On the scope of some of these provisions, see *infra* n. 35.

<sup>6</sup> For imperative character: Cour Paris (May 25, 1852) S. 1852.2.289, *aff'd*, Cass. (req.) (March 9, 1853) S. 1853.1.274, D. 1853.1.216 and others, cited by NIBOYET 676 § 553.

In Belgium: App. Bruxelles (Feb. 13, 1889) Pasicrisie 1889.2.170.

<sup>7</sup> See the learned report by the Procureur Général Baudouin, in the case, Gesling v. Viditz, *infra* n. 10, Clunet 1909, 1097, 1113; cf. STORY § 262, notes.

<sup>8</sup> SAVIGNY § 381 note (p) with references to older authors.

<sup>9</sup> Saxony: C. C. (1863) § 9.

Italy: C. C. (1865) Disp. Prel. art. 9.

apply to a transaction by which a real right is created or disposed of.

In other words, the "*lex causae*" is considered as governing in the first instance; but if its formal requirements are not fulfilled, validity is saved by compliance with the local law.

This optional or permissive function of *locus regit actum* has been adopted in the vast majority of modern doctrines and enactments.<sup>10</sup> It has also been claimed to be the existing law in England.<sup>11</sup>

If we say that the parties are permitted to use the local form, this does not necessarily require that they actually know the differences of formal prescriptions or intentionally

<sup>10</sup> Canada, Quebec: C. C. arts. 7, 776, as construed by the Supreme Court of Canada, *Ross v. Ross* (1893) 25 Can. Sup. Ct. 307.

Austria: OGH. (Nov. 20, 1894) GIU. No. 15301; 1 EHRENSWEIG-KRAINZ 109; WALKER 233.

Brazil: Former Introd. Law (1916): prevailing interpretation. See C. BEVILAQUA, 1 C. C. Com. 133, obs. 1; BEVILAQUA 258; 1 PONTES DE MIRANDA 528; ESPINOLA, 8 Tratado 584ff.; CARVALHO SANTOS, 1 C. C. Interpret. 154 and others (against a small minority of writers); and the great majority of court decisions, see more recently, App. Fed. Distr. (Sept. 14, 1933) 28 Arch. Jud. 473; App. São Paulo (Jan. 16, 1941) 130 Rev. Trib. São Paulo 655.

Introd. Law (1942) art. 9 § 1, as commented upon by ESPINOLA, 2 Lei Introd. 586; SERPA LOPES, 2 Lei Introd. 347. *Contra*: TENORIO, Lei Introd. 219.

China: Int. Priv. Law, art. 26.

Costa Rica: C. C. art. 8.

France: Cass. (civ.) (July 20, 1909) *Gesling v. Viditz*, D. 1911.1.185, S. 1915.1.165, Clunet 1909, 1097, Revue 1909, 900, recognizing validity of a will under the testator's national law, but this is extended in the literature to all contracts (NIBOYET 677 § 553, LEREBOURS-PIGEONNIÈRE 277 § 246) and to every *lex causae* (BATIFFOL 366-367 § 429 against other writers); App. Alger (May 26, 1919) Revue 1921, 117, Clunet 1920, 241 (will); Trib. civ. Seine (Feb. 23, 1921) Revue 1922, 622.

Germany: EG. BGB. art. 11; similarly, the former German common law: App. Rostock (Nov. 12, 1866) 24 Seuff. Arch. No. 185; RG. (April 27, 1881) 37 Seuff. Arch. No. 1; RG. (July 7, 1883) 14 RGZ. 183.

Hungary: See SCHWARTZ, 40 Z.int.R. (1929) 199.

Italy: Disp. Prel. (1942) art. 25.

Japan: Int. Priv. Law, art. 8.

Norway: See CHRISTIANSEN, 6 Répert. 571 No. 85.

Poland: Int. Priv. Law, art. 5.

Soviet Union: Probably, MAKAROV, Précis 253.

Sweden: See MALMAR, 7 Répert. 135 § 100.

<sup>11</sup> CHESHIRE 247, 248 terms it a fair conclusion.

prefer the usages at the place where they happen to be. Although there were statist writers who explained the rule, *locus regit actum*, by self-subjection of the parties to the *consuetudo loci*,<sup>12</sup> it is well settled everywhere, excepting a recent ill-advised English decision,<sup>13</sup> that the rule in any version operates independently of the intention of the parties.<sup>14</sup>

In either variant, at present, the scope usually is extended to all transactions of private law with definite exceptions. Thus, the German provisions except transactions modifying the title to property, subjecting them to the *lex situs*. However, agreements to convey property, including immovables, in modern law generally follow the rule, *locus regit actum*.<sup>15</sup> But the Polish law and the Swiss doctrine and others also refer to the *lex situs* obligations entered into to transfer or to constitute rights in immovables situated in the forum. These are rather regrettable rules, inviting conflicts to the detriment of the parties acting in good faith.

Most codes, moreover, contain special rules for marriage, adoption, wills, negotiable instruments, and other acts, which are not included in the discussion here.

*Illustration.* Rhea agreed orally in South Dakota, for a consideration of ten dollars, to convey his land situated in Iowa to Meylink. The statute of frauds in South Dakota "struck," as the Iowa Court expressed it, at the contract itself and did not admit an exception in case of partial payment. Under the Iowa statute, only the question whether the contract was provable depended on a written document and the payment of the ten dollars made the sales agreement

<sup>12</sup> See, for instance, PAUL VOET, *De statutis eorumque concursu*, Sect. IX Cap. 2 § 9 (to be found in SAVIGNY 488, tr. Guthrie) refuted by STORY § 261.

<sup>13</sup> *In re Priest, Belfield v. Duncan* [1944] 1 All E. R. 51, per Bennett, J., criticized by KAHN-FREUND, 7 Modern L. Rev. (Nov. 1944) 238.

<sup>14</sup> Nice peripheral questions arising when parties temporarily dwell in a foreign country have been treated by RAAPE 186.

<sup>15</sup> This is also the well-known rule of English law, see DICEY 588, CHESHIRE 542.

enforceable. The Supreme Court of Iowa applied this, its own, law on the ground that *lex situs* governed the entire contractual relation.<sup>16</sup>

As we are not concerned now with the transfer of real property, we shall set aside this construction and consider the configurations arising if the obligatory contract to sell an immovable is sharply separated and construed on its own merits, as Mr. Justice Holmes once did,<sup>17</sup> and many laws do, following the advanced Roman system.

(i) *Lex causae imperative*. If the court had thus separated the problems of obligation from those of title, it could have nevertheless reached the same result, by application of the Iowa law either as *lex loci solutionis* or as the law presumably intended by the parties, assuming it to govern the entire contractual relation.<sup>18</sup>

(ii) *Lex causae optional*. German courts recognize an agreement orally made in Germany by persons of any nationality, creating the obligation to transfer ownership, for instance, of an Italian immovable, according to Italian law,<sup>19</sup> although the German Civil Code, § 313, requires that an agreement to transfer land be embodied in an instrument drawn up by a court or notary.<sup>20</sup> (EG. BGB., art. 11, paragraph 1, sentence 1, *supra* p. 487)

(iii) *Lex loci contractus optional*. Conversely, where two Germans in Austria agreed by simple written contract on

<sup>16</sup> *Meylink v. Rhea* (1904) 123 Iowa 310, 311, 98 N. W. 779, 780. The case is taken as an illustration only. We shall discuss sales contracts with respect to immovables in a special chapter in Volume III.

<sup>17</sup> *Polson v. Stewart* (1897) 167 Mass. 211, 213, 45 N. E. 737, 738.

<sup>18</sup> See Note, "Conflicts of laws as to contracts in relation to real property," L. R. A. 1916A, 1011, 1021ff.

<sup>19</sup> Written form is sometimes claimed to be required by Italian C. C. art. 1314 (new 1350), also for the obligatory contract; but see FEDOZZI 251.

<sup>20</sup> RG. (March 3, 1906) 63 RGZ. 18 states the rule. Accordingly, OLG. München (Feb. 7, 1912) 26 ROLG. 246: formless promise in Germany of a trousseau valid although the governing Austrian law required notarial form, see Law of July 25, 1871, RGBI. No. 76.

the sale of a German immovable, the Austrian law of the place of contracting sufficed to validate the act even before a German court.<sup>21</sup> (EG. BGB., art. 11, paragraph 1, sentence 2, *supra* p. 487)

(iv) *Lex loci contractus obligatory*. Under the doctrine as it was formerly settled in England, compliance with the formalities of *lex loci contractus* was necessary, hence all solutions discussed above, except *sub* (iii), would be excluded. The contracts in South Dakota and Germany would be unenforceable. It is very significant that, in the case of an agreement to sell land, an exception was recognized in England. In this case, formal validity is said to be sufficiently supported by the proper law of the contract, which in general, though not necessarily, is the *lex situs*.<sup>22</sup>

These few examples demonstrate the great interest parties unaware of foreign law have in the rule and particularly in its optional form.

### 3. *Lex Causae*

*United States*. Exactly what is the present rule in this country? Story seemed favorable to the imperative *lex loci contractus* with special reference to formalities.<sup>23</sup> Wharton stated a practical concurrence of English and American jurists in acknowledging the rule, *locus regit actum*, and only doubted whether the rule was imperative or optional.<sup>24</sup> He was followed by Mr. Justice Hunt, speaking for the Supreme Court, who stated that "obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*."<sup>25</sup> To some writers, reviewing the situation

<sup>21</sup> KG. (March 19, 1925) 44 ROLG. 152 expressly denying the objection of public policy; RG. (May 16, 1928) 121 RGZ. 154, 157 (Czechoslovakian immovable).

<sup>22</sup> DICEY 644 exception 1 to Rule 159; CHESHIRE 543-545.

<sup>23</sup> STORY § 260 *cf.* § 242a.

<sup>24</sup> 2 WHARTON 1436, 1438 §§ 676, 679.

<sup>25</sup> Scudder v. Union Nat'l Bank (1875) 91 U. S. 406, 411.

from the angle of European doctrine, the cases appear practically, though not by definition, to agree with the optional rule.<sup>26</sup> This, however, as a description of the existing law, is certainly inaccurate.

With good reason, Lorenzen has always maintained that, as in former times, form, unseparated from substance, is governed by the general law of the contract, which need not by any means be that of the place of contracting.<sup>27</sup> No modern case has been found distinctly applying the law of the place of making solely because *formal* validity was in question.

The decisions mostly involve the statute of frauds, immovables, insurance policies, conditional sales, and negotiable instruments. We shall have to deal with each of these subjects later on.<sup>28</sup>

*Other countries.* The Treaty of Montevideo applies its principle of *lex loci solutionis* also to the problems of formal validity, with the exception only that "the forms of public instruments are governed by the law of the place in which they are executed."<sup>29</sup> This exception has been criticized as inconsistent with the principle and in the revision has been reduced to the execution of the public forms prescribed by the applicable law.<sup>30</sup> That obligations referring to immovables, though independent contracts, as remarked before, are compulsorily subject to the *lex situs*, is provided in the Polish law.<sup>31</sup>

<sup>26</sup> BATIFFOL 372 § 435; NUSSBAUM, 51 Yale L. J. (1912) 893, 906ff. and Principes 148 § 15; HINRICHSSEN, *Die lex loci contractus im amerikanischen Internationalprivatrecht* (Heidelberg 1933) 6.

<sup>27</sup> LORENZEN, 20 Yale L. J. (1911) at 427; 6 Répert. 317 No. 174; 15 Tul. L. Rev. (1941) 165 at 173; Book Review, 57 Harv. L. Rev. (1944) 123; see also GOODRICH 270 § 106.

<sup>28</sup> On the Statute of Frauds, see *infra* II 2.

<sup>29</sup> Treaty of Montevideo on Int. Civil Law (1889) art. 39 cf. 32, following the doctrine of Gonzalo Ramirez. See ALFREDO AROCENA, *Los Actos Jurídicos en el Derecho Internacional Privado* (1896, reprint Montevideo 1941).

<sup>30</sup> 2 VICO 288 § 351; VICO, Report on the Revision of the Treaty, República Argentina, Segundo Congreso Sudamericano (1940) 165; SALÁZAR *id.* 207.

<sup>31</sup> Poland: Int. Priv. Law, art. 6.



#### 4. Exceptional Rules

(a) *National law*. Some codifications, with the earlier prevalence of the local law in mind, have offered as an alternative only that the form agree with the common national law of all parties.<sup>32</sup> Diverse codes derive therefrom a triple option: the form may comply with any of three laws, that governing the whole transaction, or that of the place of making, or the national law of all parties.<sup>33</sup>

(b) *Cumulated tests*. The *Código Bustamante* declares that "the law of the place of contracting and that of performance shall be applied simultaneously to the necessity of executing a public indenture or document for the purpose of giving effect to certain agreements and to that of reducing them to writing." This seems to mean that, instead of favoring the contract by an alternative, the requirements are cumulated.<sup>34</sup> This definitely is a cumbersome solution.

(c) *Law of the forum*. Using a method of reserving application of the *lex fori*, described earlier, several Latin-American enactments, headed by the Chilean Code, which followed an Austrian suggestion, impose their internal formalities on contracts "destined to have effect" in the state, a formula which would seem to presuppose a place of performance at the forum, but sometimes appears to require no more

<sup>32</sup> Belgian Congo: C. C. art. 11 par. 1.

Greece: Formerly C. C. (1856) art. 7 for Greeks abroad.

Italy: Formerly Disp. Prel. (1865) art. 9 par. 1, C. Com. art. 58.

Spanish Morocco: Int. Priv. Law, art. 19, and Tanger: Int. Priv. Law, art. 10 for transactions of foreigners in the zones.

<sup>33</sup> Greece: C. C. (1940) art. 11.

Italy: Disp. Prel. (1942) art. 25.

French Morocco: Int. Priv. Law, art. 10 knows even four possibilities for validity, viz., the laws of nationality of the parties, those of France, those of the Protectorate, and the laws and customs of Morocco.

<sup>34</sup> *Código Bustamante*, art. 180. DE BUSTAMANTE, Manual 281 § 114 gives no reason. Probably to the same effect, the new Brazilian Introd. Law (1942) prescribing Brazilian forms, *infra* n. 35, nevertheless requires observation of the law of the place of contracting.

than a law suit for enforcement at the forum.<sup>35</sup> This is also provided in Georgia.<sup>36</sup> An illustration has been given by a Chilean writer: a contract of partnership, executed in France by private instrument, is without value in Chile where solemn execution is required.<sup>37</sup>

On the other hand, we may recall those codes that uphold the validity of contracts agreeing with the law of the forum.<sup>38</sup> Sometimes these code provisions have been understood to cover only formal requirements.<sup>39</sup>

The Civil Code of Mexico gives an option between the law of the place of contracting and the national law of the forum to be exercised only when persons domiciled in the

<sup>35</sup> Brazil: Introd. Law (1942) art. 9 § 1, a most confusing provision, seems to envisage contracts performable in Brazil and to provide that they must follow the formalities compulsorily prescribed in Brazil (*forma essencial*). See TENORIO, Lei Introd. 218; SERPA LOPES, 2 Lei Introd. 347; probably also ESPINOLA, 2 Lei Introd. 603. But Dr. Frazão orally advises caution, because *forma essencial* might be reasonably understood as referring to the necessity of a public instrument only and, hence, might be applicable exclusively to contracts for the transfer or constitution of rights in immovables, under C. C. art. 134 II.

Costa Rica: C. C. art. 8 par. 1.

Guatemala: Law on Foreigners of 1936, art. 24 sent. 2.

Nicaragua: C. C. VI (14) par. 1.

Panama: C. C. art. 7.

Venezuela: C. C. (1942) art. 11 par. 1.

With special regard to public documents:

Chile: C. C. art. 18.

Ecuador: C. C. art. 17.

El Salvador: C. C. art. 16.

Honduras: C. C. art. 16.

Uruguay: See GUILLLOT, I C. C. 123.

Perhaps also VALÉRY 1223 § 873 and his Note, Clunet 1922, 990 has been influential on some of these laws.

Colombia: C. C. art. 22 replaces the reference to be found in the Chilean Code to "proofs which shall have effect in Chile," by reserving "matters of national competence"; 2 RESTREPO HERNÁNDEZ 45-47 § 1031 asserts that this reduced role of the *lex fori* is justified, but is it clear?

<sup>36</sup> Georgia: Code Ann. (1933) § 102-108.

<sup>37</sup> G. PALMA ROGERS, I Derecho Comercial (1940) 312.

<sup>38</sup> Austria: Allg. BGB. §§ 35-37.

Argentina: C. C. art. 14 (4).

<sup>39</sup> See, e.g., I EHRENZWEIG-KRAINZ 110 § 30 in reference to § 35 of the Austrian Allg. BGB.

forum contract abroad for performance within the forum.<sup>40</sup> This awkward legislation causes many doubts.

(d) *Preponderance of lex causae*. A few European writers have postulated a general subordination of the local law to the *lex causae*.<sup>41</sup> French authors, in particular, have been preoccupied by the formalities of marriage, conceiving *lex causae* and national law as identical, and have requested that solemnities should always be prescribed by the *lex causae*; the *lex loci contractus* should intervene only for determining the acts by which or the manner in which a solemnity can be executed.<sup>42</sup> Following this current, the Institute of International Law in 1927 adopted a set of rules by which the law governing the substance of a transaction not only may dispense it from solemnities required by the local law—which does not go beyond the optional meaning of *locus regit actum*—but also may “expressly,” though not by mere construction, impose an “authentic,” i.e., public, act not required locally.<sup>43</sup> Of course, the *Código Bustamante*, art. 180, goes beyond this restriction upon the local law, providing quite generally that both the law of the place of contracting and that of its “*ejecución*”—which probably means performance—shall be applied simultaneously to the necessity of properly executing a public indenture or document.

In the field of obligatory contracts, such theses seldom have been put into actual practice. At most, there are instances like the following. The German Reichsgericht has reasonably argued that parties selecting the applicable law are supposed to leave to this law, which is the *lex causae*, the decision

<sup>40</sup> Mexico: C. C. (1928) art. 15.

<sup>41</sup> In particular for the protection of the national law, 1 FRANKENSTEIN 522; DE VOS, 16 *Revue Inst. Belge* (1930) 133 at 155 and writers cited therein.

<sup>42</sup> 2 ARMINJON 135 § 59 with references. *Contra*: especially LEREBOURS-PIGEONNIÈRE 367 § 315 who observes that the parties cannot know which law will govern.

<sup>43</sup> *Annuaire* 1927 III 185, 317, 335 (art. VI). To a similar effect, Belgian revised draft, art. 10, NEUMANN, IPR. 201.

whether it recognizes the maxim, *locus regit actum*.<sup>44</sup> Another case has aroused much attention. Membership in a German private limited company (*Gesellschaft mit beschränkter Haftung*) cannot be transferred except by a public instrument. At a time when this type of corporation had not yet been adopted in Switzerland, a transfer of such a membership was made there by simple written contract, under the general Swiss rule that contracts need no form. A German court invalidated the contract on the ground of German public policy discarding the rule, *locus regit actum*.<sup>45</sup> Others attained the same result by the argument that the Swiss law of the time had no provision at all for this specific type of contract.<sup>46</sup> The local law, thus, would only be applicable, if it recognizes the same kind of contract. This proposition, however, is strikingly inconsistent with the assumption that parties may evade the most solemn formalities of the *lex causae* by using less or no formality under the law of the place where they are. In fact, the decision should have been justified on a third basis. The formal and substantive requirements of transfer of membership do not pertain to the scope of obligatory contracts but are a part of the personal law of the corporation. German law, hence, determined imperatively the formal conditions of a change in the membership; and contrary to the Reichsgericht, it should not make any difference what formality is prescribed by the present Swiss law in the case of Swiss private limited companies.

## II. SCOPE OF THE RULES

### 1. Concept of Formal Requirements

There is practically no doubt that the concept of form includes the problems whether oral conclusion suffices or

<sup>44</sup> RG. (Feb. 27, 1913) Warn.Rspr. 1913, No. 302.

<sup>45</sup> OLG. Karlsruhe (July 11, 1901) 3 ROLG. 263, 11 Z.int.R. 458; NIE-MEYER, Das. IPR. des BGB. 116. *Contra*: RAAPE 189.

<sup>46</sup> RG. (March 22, 1939) 160 RGZ. 225, 228, evidently following the views of 1 FRANKENSTEIN 201 n. 156; LEWALD 69 No. 91.

there is required written documentation, use of certain words, signature with one's own hand, seal; co-operation of a public official, such as authentication of signatures and minutes of declarations of consent, taking oaths, or entry in a public register; presence of witnesses; service of declaration by registered mail, or by a sheriff or marshal, et cetera. On the other hand, it is also certain that formality has nothing to do with capacity to contract;<sup>47</sup> with agency; with the questions whether an obligation is created by a unilateral declaration, and whether declarations must reach the addressee in order to be effective; with the rules of evidence; and with the consent of third parties, called in certain countries "*forme habilitante*." It is obvious that formal in contrast with substantive requirements are concerned with the exterior of contractual declarations, the means of expressing consent.

However, the border lines between form and substance are not free from uncertainty in all laws, and this gives the dominant theory one more opportunity to entrust to the domestic law of the forum the power to decide what should be form in the meaning of the conflicts rule.<sup>48</sup> The opposite theory of characterization, according to the law referred to, results in applying the municipal provisions of the law at the place of making to those problems which are considered problems of form at this place.<sup>49</sup> In the writer's opinion, the precise domain of form must be defined, for the purpose of conflicts law, according to the common denominator of what is regarded as form in the various municipal systems: Form is

<sup>47</sup> It is true, there is a theory of a few French writers that such a provision as that requiring promises of gift to be in writing (French C. C. art. 931; German BGB. § 518 and many other codes) involves the capacity of the donor rather than form and hence are subject to his national law. See 2 LAURENT 433ff. §§ 240ff., 6 *id.* 693 § 417; LÉON DUGUIT, *Des conflits de législations relatifs à la forme des actes civils* (Paris 1882) 113 (unavailable); POULLET § 289; ROLIN, *Annuaire* 1925, 228; NIBOYET 660-661 § 537. This has been generally recognized as an error. See e.g., PILLET, 2 *Traité* 459 § 623; WEISS, 3 *Traité* 111; KOSTERS 190; ARMINJON, 2 *Précis* § 59.

<sup>48</sup> NIEMEYER, *Das IPR.* 111; LEWALD 65; MELCHIOR 143 § 98; NUSSBAUM, *D. IPR.* 89; RAAPE 174 and *D. IPR.* 131 (with uncertain restrictions).

<sup>49</sup> M. WOLFF, *IPR.* 78.

the external side of the making of the contract, the expression as opposed to the content of legal declarations. A separate rule for "form" as contrasted with "substance" of the contract is only justified, if at all, by the relatively minor importance of the manners of expression. If the Dutch Code provides—to use the most celebrated example, although it deals with wills and not with contracts—that a Dutchman should not make a testament in a foreign country by private document, this regards form. To characterize this provision as one restricting capacity to make a will, as many French writers have done, is a plain artifice, which no Dutch lawyer employs.<sup>50</sup> In reality, the Dutch conflicts rule permitting local foreign forms is discarded in this case. Other countries may or may not give effect to this prohibition by adjusting their conflicts rules, as a matter of international policy. But it is difficult to see why they should yield to this exorbitant Dutch pretension. All countries have a stake in the security of transactions, not to be disturbed by willful national claims. Still less, are singular national "characterizations" entitled to extraterritorial recognition. It is a perfect parallel to the controversial character of compulsory religious marriage.<sup>51</sup> Hence, if the law of the place of contracting, that governing the contract, or that of the forum should have developed some extraordinary method of tracing the border line between form and capacity or other substantive incidents, this is immaterial for the scope of the conflicts rule relating to form.

## 2. Form and Procedure<sup>52</sup>

(a) *Statute of Frauds*. The variants in which the old Statute of Frauds (1677)<sup>53</sup> reappears in British and American

<sup>50</sup> See MELCHIOR 143 § 98.

<sup>51</sup> See citations Vol. 1 pp. 214-216.

<sup>52</sup> It is not intended to deal here with those contracts made for procedural purposes previous to or during a lawsuit, such as submission to arbitration or to a state court, confession, release, waiver of remedies. They involve particular conflicts problems not thoroughly investigated thus far.

<sup>53</sup> 29 Car. 2, c. 3, s. 4.

statutes,<sup>54</sup> all contain formal requirements, if judged according to the normal conceptions of a modern lawyer, and therefore have to be taken as subject to the conflicts rules concerning form. It does not matter how a statute of frauds is treated for particular purposes of municipal law in the positive practice of courts. This, indeed, agrees with the conclusion of recent English and American writers,<sup>55</sup> strengthened by the French parallels to be discussed hereafter, as well as with the prevailing attitude of American cases.<sup>56</sup> In this country, *Leroux v. Brown*<sup>57</sup> and the American cases following this ill-famed precedent or other mistaken theories<sup>58</sup> should no longer continue to be held as authority.<sup>59</sup> The arguments underlying the better modern approach have been vigorously expounded in Lorenzen's excellent papers<sup>60</sup> and more recently summarized by the Delaware Superior Court.<sup>61</sup> (1) It assures more security for the inhabitants of a state to know that all contracts made in such state either must be written or may

<sup>54</sup> On the maximum amounts for oral agreements in the various jurisdictions of the British Commonwealth and the United States, see RABEL, 1 *Recht des Warenkaufs* 110-112. For a summary of American cases, see PARMELE, "Statute of Frauds and conflict of laws," 105 A. L. R. (1936) 652-681; DOBBINS, "Conflict of Laws—Statute of Frauds as Defense to Enforcement of Contract Executed in One State and Sued on in Another State. [Illinois]," 3 Wash. and Lee L. Rev. (1941) 103; BRIDGFORTH, "The Mississippi Statute of Frauds in the Conflict of Laws," 14 Miss. L. J. (1942) 256; Note, 6 Md. L. Rev. (1942) 262.

<sup>55</sup> BECKETT, CHESHIRE, LORENZEN, CHEATHAM, BEALE, GOODRICH cited Vol. 1 p. 50. This was also STORY's well-known position (ed. 1, 1834) § 262, and that of 2 WHARTON § 690 and THAYER, Preliminary Treatise on Evidence 390ff.

<sup>56</sup> *Cochran v. Ward* (1892) 5 Ind. App. 89, 29 N. E. 795; *Franklin Sugar Refining Co. v. Lipowicz* (1928) 247 N. Y. 465, 160 N. E. 916 with ample references; *Oakes v. Chicago Fire Brick Co.* (1941) 311 Ill. App. 111, 35 N. E. (2d) 522 following "the weight of authority."

<sup>57</sup> (1852) 12 C. B. 801.

<sup>58</sup> LORENZEN, "The Statute of Frauds and the Conflict of Laws," 32 Yale L. J. (1923) 311, 315-318; STUMBERG 137-141.

<sup>59</sup> Because of uncertain arguments in a few cases, noted in 3 Wash. and Lee L. Rev. (1941) 103; 14 Miss. L. J. (1942) 256; 6 Md. L. Rev. (1942) 262, some annotators have assumed a continued grave division of opinion.

<sup>60</sup> LORENZEN, *supra* n. 58.

<sup>61</sup> *Lams et ux. v. Smith Co.* (1935) 36 Del. 477, 178 Atl. 651; the importance of this decision has been noted 105 A. L. R. (1936) 646; *Clunet* 1937, 873 with Note by Barbey; *BARBEY*, *Le Conflit* 94, 97.

be oral, respectively; (2) while England has one statute of frauds, there are as many as there are jurisdictions in this country; and (3) the fate of a contract ought not to depend on selecting a court before which to bring the suit. As the significance of this classification has been treated on an earlier occasion,<sup>62</sup> it remains only to illustrate the practical effects by a few cases.

(i) Goods of more than £10 value were sold in England without a memorandum in writing. Although English courts may regard the unenforceability of an action on the contract as lack of a remedy, foreign courts have to apply section 4 of the English Sale of Goods Act as a part of English law, deemed to govern the form.<sup>63</sup>

(ii) An oral agreement was entered into in Tennessee, to sell a quantity of cheese free on board cars in Wisconsin. The amount involved exceeded the permitted scope of an executory oral contract under Wisconsin law. The Wisconsin court held the contract governed by the law of Tennessee because it was so intended by the parties, and therefore valid.<sup>64</sup>

(iii) Even though the forum were to characterize its own statute of frauds as "procedural," it will confine this characterization to the purposes of domestic private and procedural law. It will not apply this statute to contracts the form of which is regarded as governed by foreign law.

That courts in this field would tend to uphold the contract by the means of choice of law cannot fairly be stated. Most cases have been of such nature as to justify in the opinion of the courts the application of the law of the place of contracting, often identical with the law of the forum.<sup>65</sup> Other

<sup>62</sup> Vol. 1, 50-52.

<sup>63</sup> LORENZEN, 32 Yale L. J. (1923) 311 at 315.

<sup>64</sup> *D. Canale & Co. v. Pauly & Pauly Cheese Co.* (1914) 155 Wis. 541, 145 N. W. 372.

<sup>65</sup> Resulting in validity: *Hunt v. Jones* (1879) 12 R. I. 265, 34 Am. Rep. 635; *Perry v. Mount Hope Iron Co.* (1886) 15 R. I. 380, 2 Am. St. Rep. 902; *J. H. Ellis and Cap Baker v. The Eagle-Picher Lead Co.* (1924) 116 Kan. 144, 225 Pac. 1072; *Straesser-Arnold Co. v. Franklin Sugar Refining*



decisions favor the law of the place of performance over the *lex loci contractus* for various reasons.<sup>66</sup>

(b) *Exclusion of nonwritten evidence.* The French Civil Code (art. 1341) provides that any transaction exceeding the value of (originally) one hundred fifty francs must be executed before a notary or by private writing, and that no proof by witnesses is accepted. This provision has been widely imitated, with many variants in civil and commercial laws. Testimony may be entirely excluded, as under the former Russian law; or some mention of the agreement in a letter suffices as a "commencement" of proof which may be completed by testimony; or the agreement is enforceable, if the other party admits its making. Also in France witnesses may be admitted to testify to a commercial agreement in the discretion of the court.<sup>67</sup>

In the French tradition, stemming from the fourteenth century, all these provisions belong to the group of *decisoria litis*, contrasted with *ordinatoria*: they are not merely destined to regulate the course of proceeding but also to decide the substance of the suit. In this conception repeatedly pronounced by the French Supreme Court and shared by the overwhelming majority of the Latin countries, legal presumptions, judicial confession, and certain kinds of party oaths terminating litigation, also are substantive matters and governed by the *lex causae*, at least to the extent that none

Co. (1925) 8 F. (2d) 601; and particularly *Lams et ux. v. Smith Co.* (1935) *supra* n. 61.

Resulting in unenforceability: *Dacosta and Davis v. Davis and Hatch* (1854) 24 N. J. Law (4 Zab.) 319; *Cochran v. Ward* (1892) 29 N. E. 795; *Osborne v. Dannatt* (1914) 167 Iowa 615, 149 N. W. 913 (Nebraska law).

<sup>66</sup> See for a list *PARMELE*, *supra* n. 54, 105 A. L. R. (1936) 675-677.

*Garnes v. Frazier & Foster* (Ky. 1909) 118 S. W. 998 rejects the action on the basis of the law of the forum which was also that of the place of performance as against the *lex loci contractus* of West Virginia. The court seems to construe the defense as a remedy depriving the plaintiff of a cause of action.

<sup>67</sup> See the survey in *RABEL*, 1 *Recht des Warenkaufs* 108-110.

of these procedural means is admissible unless it is permitted by the law governing the substance.<sup>68</sup>

This theory of "preconstituted proofs" certainly extends the domain of substantive law further and restricts that of procedure more than the common law or the laws of Northern and Central Europe can concede. A French writer, on the background of comparative research, suggests in fact the elimination of such institutions as confession and oath from the doctrine.<sup>69</sup>

But, notwithstanding some doubts in past times<sup>70</sup> and isolated opposition by modern writers,<sup>71</sup> the rules restricting testimony by witnesses in favor of written documentation generally enjoy classification as pertaining to formalities in the meaning of conflicts law.<sup>72</sup> This is a very interesting fact. It is quite true that the idea of legislators drafting such provisions centers in the procedural situation of a suit on the contract; originally they attempted to obviate perjury

<sup>68</sup> Cass. (civ.) (February 23, 1864) D. 1864.1.166, S. 1864.1.385; and many other decisions, particularly Cass. (civ.) (June 14, 1899) *Abdy v. Abdy*, S. 1900.1.225, Clunet 1899, 804 followed in the same cause by Cass. (civ.) (Feb. 6, 1905) D. 1905.1.481, S. 1907.1.393, Clunet 1906, 412. Cf. PILLET, Note, S. 1900.1.225; SURVILLE 667 n. 3; NIBOYET 678 § 557; LEREBOURS-PIGEONNIÈRE 370 § 318; BATIFFOL 376 § 442. And see for the application of the Ordonnance de Moulins, 1566, art. 54, precursor of C. C. art. 1341, DANTY, *Traité de la preuve par témoins* (ed. 6, 1769) 49 No. 11.

<sup>69</sup> BATIFFOL 377 § 444.

<sup>70</sup> Obertribunal Stuttgart (Sept. 25, 1858) 13 Seuff. Arch. No. 182, cited by LORENZEN, 32 Yale L. J. (1923) at 319 n. 31 and 334 n. 81 is not representative of the German doctrine.

<sup>71</sup> FRANKENSTEIN 364-370 and in JW. 1929, 3506; RAAPE 175, later abandoned, D. IPR. 132.

<sup>72</sup> See the long list of writers, collected by LORENZEN, 32 Yale L. J. (1923) at 329 n. 66.

Germany: 2 BAR 377 § 395; KG. (Oct. 25, 1927) JW. 1929, 448, IPRspr. 1929 No. 7 (oral agreement in Russia exceeding value of 500 gold rubles; Soviet Code of Civil Procedure applied); RABEL, 5 Z.ausl.PR. (1931) 280 and authors cited; NUSSBAUM, D. IPR. 90; RAAPE, D. IPR. 132, 2.

Greece: App. Athens (318/1934) cited by FRAGISTAS, 10 Z.ausl.PR. (1936) 644.

Poland: S. Ct. (Nov. 18, 1936) 4 Z.osteurop.R. (1938) 380.

by bribed witnesses. But, as the French Advocate General in a learned report of 1880 remarked, in the eyes of the parties making a contract, the problem is whether they must reduce it to writing.<sup>73</sup> This, however, is enough of a form problem for the purposes of conflicts law, despite the fact that admission of a witness is certainly a judicial act.

Lorenzen has correctly co-ordinated this indirect compulsion to writing with the statutes of frauds, both to be treated under the conflicts rule concerning formalities. Johnson, too, writing in Quebec, has seen the analogy of the two institutions (which in reality rests upon a close historical connection), and, after hesitating between *Leroux v. Brown* and the French doctrine, wisely preferred the latter.<sup>74</sup>

(c) *Parol evidence*. In England and the United States, the rules excluding parol evidence controverting the text of written contracts have sometimes been construed as remedial,<sup>75</sup> but the great weight of authority classifies them as substantive for the purpose of conflicts law.<sup>76</sup> This sound view agrees with the Continental theory.<sup>77</sup>

### 3. Form and Revenue Law

A vivid discussion went on for a time between followers of the idea that the revenue laws of a foreign state are not

<sup>73</sup> Proc. Gen. Desjardin in the case *Benton v. Horeau*, Cass. (civ.) (August 24, 1880) D. 1880.1.447, Clunet 1880, 480.

<sup>74</sup> 3 JOHNSON 704-724. Historical analysis, as I may add, joins the English and French legislation in an unsuspected relationship. The Statute, in fact, was inspired by the French Ordonnance de Moulins of A. D. 1566, art. 54, predecessor of arts. 1341ff., C. C., and both to a large extent had the very purpose of prescribing formalities. See RABEL, "The Statute of Frauds and Comparative Legal History," 63 Law Q. Rev. (1947) 174.

<sup>75</sup> *Downer v. Chesebrough* (1869) 36 Conn. 39, 4 Am. Rep. 29.

<sup>76</sup> *Dunn v. Welsh* (1879) 62 Ga. 241; *Baxter Nat'l Bank v. Peter S. J. Talbot* (1891) 154 Mass. 213, 28 N. E. 163; Restatement § 599; THAYER, Preliminary Treatise on Evidence (1898) 390; WIGMORE, 5 Evidence (ed. 2, 1923) § 2400; GOODRICH 209 § 86; STUMBERG 136.

<sup>77</sup> See French C. C. art. 1341 and its literature cited above.

to be enforced,<sup>78</sup> and the advocates of *locus regit actum*. The former denied,<sup>79</sup> the latter recommended<sup>80</sup> the rejection of contracts that are declared void for want of a stamp at the place of making. Older English decisions have recognized the invalidity imposed by the law of the place of contracting.<sup>81</sup> But in the field of bills of exchange where the question is more important, the British Bills of Exchange Act of 1882 departed from this view,<sup>82</sup> and the Geneva Convention of 1930 concerning stamp laws, adopted by many countries,<sup>83</sup> pronounced that the validity or the exercise of the rights flowing from such instrument shall not be subordinated to the observance of the provisions concerning the stamp.

It seems high time to generalize this sound principle, in agreement with the American cases. Since one of the two conflicting views must yield, it stands to reason that laws clinging to fiscal sanctions against the security of contracts should be internationally ignored.

<sup>78</sup> *In re Visser*, H. M. The Queen of Holland v. Drukker [1928] Ch. 877; *Moore v. Mitchell* (1929) 30 F. (2d) 600, note opinion of Learned Hand, J., reproduced by 3 BEALE 1637.

<sup>79</sup> United States: Ann. Cas. 1915 B 844, *Ludlow v. Van Rensselaer* (1806) 1 Johns. Cas. (N. Y.) 94; *Skinner v. Tinker* (N. Y. 1861) 34 Barb. S. C. 333. Italy: App. Napoli (Dec. 29, 1926) 19 Rivista (1927) 268.

<sup>80</sup> NUSSBAUM, D. IPR. 89 n. 2, 319 n. 5 cites and approves a few Continental cases; FEDOZZI 255 and GOODRICH 271 approve the older English view.

<sup>81</sup> *Alves v. Hodgson* (1797) 7 T. R. 241 at 243 by Kenyon, C. J. "Then it is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there it is not obligatory in a court of law here." *Clegg v. Levy* (1812) 3 Camp. 166; *Bristow v. Sequeville* (1850) 5 Ex. D. 275; *República de Guatemala v. Nuñez* [1927] 1 K. B. 669. In case the foreign law declares only that an unstamped contract is inadmissible as proof, the English courts applied their procedural theory of disregarding the foreign rule of evidence, *James v. Catherwood* (1823) 3 D. & R. 190; *In re Visser*, H. M. The Queen of Holland v. Drukker [1928] Ch. 877. See DICEY 704 note (9); CHESHIRE 245.

<sup>82</sup> 45 & 46 Vict., British Bills of Exchange Act, 1882, c. 61, s. 72 (1) (a).

Canada: An Act relating to Bills of Exchange, Cheques and Promissory Notes, Rev. Stat. 1927, c. 16 s. 160 (a).

<sup>83</sup> Convention concerning Stamp Laws in connection with Bills of Exchange and Promissory Notes, Geneva, June 7, 1930; HUDSON, 5 Int. Legislation 560 No. 260; see literature cited Vol. 1 p. 34.

## 4. Determination of the Place of Contracting

The question where to locate the place of contracting again arises, with all its grave difficulties.

(a) *Contract by correspondence.* On the ground of the usual characterization "according to the *lex fori*," a contract is considered made at the place where the final act necessary under the law of the forum for completing the consent is done.<sup>84</sup> We have discussed this approach before.<sup>85</sup> It may suffice to remember that under this method a German court should ascertain a place of contracting in the United States by consulting the German Civil Code. By another approach, out of sheer dogmatism, cumulative application of the consent requirements in both domiciliary laws has been advocated.<sup>86</sup> Continued discussion of the problem has fostered more proposals and a more complex situation.<sup>87</sup> A unilateral act, however, such as giving notice to a debtor or making a binding offer, though usually becoming legally significant only upon its reception, is generally held in conflicts law to have occurred at the place where it is sent.<sup>88</sup>

This confusion is incurable. The maxim, *locus regit actum*, was not invented for contracts or acts by correspondence, any more than was the *lex loci contractus*. If it is to be practicable in our time, it ought to be appropriately modified.

<sup>84</sup> United States: *Stevenson v. Lima Locomotive Works* (Tenn. 1943) 172 S. W. (2d) 812; 2 BEALE 1069ff. §§ 325.1, 326.1.

Germany: RG. (Feb. 12, 1906) 62 RGZ. 379, 381 (where the acceptance is declared in the case of § 151 BGB., cf. LEWALD 70ff.); RG. (Jan. 29, 1901) 12 Z.int.R. 113 (where the formal act is completed); GEILER in 1 Düringer-Hachenburg 55 n. 20.

<sup>85</sup> *Contra*: RAAPE 178; *supra* Chapter 30 pp. 452ff.; in this special field the theory of Bartin was theoretically attacked by MARCEL VAUTHIER, *Sens et applications de la règle locus regit actum* (Bruxelles 1926) 101ff.

<sup>86</sup> 1 BAR 361; NIEDNER, EG. BGB. art. 11; 2 ZITELMANN 164; RAAPE, D. IPR. 130; also OLG. Celle (Nov. 7, 1879) 35 Seuff. Arch. No. 89. *Contra*: NEUMEYER, 22 Z.int.R. (1912) 519.

<sup>87</sup> See the hard task faced by RAAPE 178-181.

<sup>88</sup> HABICHT 89; WALKER 229; NEUMEYER, IPR. 14; FRANKENSTEIN 545; RAAPE 177 and D. IPR. 130.

(b) *Determination by the parties.* If the parties agree that their contract should be deemed to be made at a certain place, while they make the contract at another place, the local law of the place indicated is not able to prevail over both the law of the real place of contracting and that governing the contract. But it may, and generally will, be itself the *lex causae*, by virtue of the party agreement. This is a controversial consideration, however, with respect to signatures on negotiable instruments, if they need the indication of a place of issuance and name an agreed location.<sup>89</sup>

### III. OPERATION OF THE RULES

#### 1. Solemnities Prescribed by *Lex Causae*

Even though a court may follow exclusively the formal requirements of the law governing the entire contract—as American courts do—it has to account for local differences in particulars. Therefore the following rule of the Restatement is true beyond its intended scope:

“§ 335. The law of the place of contracting determines whether an instrument alleged to be a contract under seal is effectively sealed; whether it is duly executed and delivered. . . .”

This rule is meant pleonastically to explain the principle that formal validity is altogether determined by the law of the place of contracting. However, it must apply also to some effect when, contrary to the Restatement, another law governs validity and requires an instrument under seal.

On the other hand, contracts governed by the law of the forum and thereby needing some publicity, may be executed outside the state in an analogous but not identical manner.

<sup>89</sup> Germany: RG. (Jan. 15, 1894) 32 RGZ. 115, 117. On the controversy and the position of the Geneva Convention of 1930, see BRACCO, *La Legge Uniforme sulla cambiale* (1935) 27; SCHNITZER, *Handelsr.* 383.

This, in fact, seems to be the meaning of the elaborate provisions commonly found in American statutes, declaring what officers may take acknowledgments outside the state in the United States and without the United States.<sup>90</sup> New York has a long list of such foreign officers, qualified according to different countries.<sup>91</sup> Only in Ohio is it expressed that "any instrument in conformity with the law of the foreign country is valid,"<sup>92</sup> but if Oregon declares it unnecessary for the instrument to state that "it is executed according to the laws of the country where made,"<sup>93</sup> the idea evidently is prevalent that a deed acknowledged before a consul of the United States, a French notary, or a German court is sufficient at the forum, if the officer conforms to his own law. The main importance of these provisions concerns their application to deeds disposing of real estate in the state, but is not confined to them.

The same is true in civil law countries, at least to the extent that, if in one country notarial form is prescribed, a notarial document of another is satisfactory despite differences of officers, recitals, witnesses, signatures, and recording.<sup>94</sup> Even under a conflicts rule such as that of Venezuela requiring public instruments or private documentation according to its own Civil Code,<sup>95</sup> it may be presumed that these writings can be drawn up according to the local style. The new text of the Montevideo Treaty expressly provides that the

<sup>90</sup> See CARL LOUIS MEIER, *Anderson's Manual for Notaries Public* (Cincinnati 1940) §§ 162ff.

<sup>91</sup> New York: Book 49, *Real Property Law* (McKinney 1936) § 301, Book 49, *Real Property Law* (McKinney 1944) §§ 301, 301a.

<sup>92</sup> Ohio: *Gen. Code Ann.* (Page 1938) § 8516, *Rev. Stat.* § 4111.

<sup>93</sup> Oregon: 5 *Compiled Laws Ann.* (1940) § 70-116, *Code* (1930) § 63-114, L. 1907, c. 169 § 1 p. 325.

<sup>94</sup> Universal doctrine, evidently meant to be expressed in the *Brazilian Introductory Law* (1942) art. 9 § 1. See, e.g., 2 *BAR* 379 § 397; *NIBOYET* 660 §§ 535, 536; *HABICHT* 87.

<sup>95</sup> Venezuela: C. C. (1942) art. 11 par. 2.  
Costa Rica: C. C. art. 8. par. 2.

formalities pertaining to the class or "quality" of instruments required by the governing law (which is always the *lex loci solutionis*) is determined by the law of the place of contracting (art. 36).

Very cautious provisions looking in the same direction are contained in the Protocol on Uniformity of Powers of Attorney, sponsored by the Pan-American Union, of which the United States is a member.<sup>96</sup>

It is regrettable that numerous European writers have confused these obvious rules by talking of the "imperative character" of *locus regit actum*, because a notary has necessarily to follow the procedure prescribed by his own law.<sup>97</sup> In reality, the principal function of *locus regit actum* is not even in question, but, on the one hand, internal rules are construed so as to permit authentication by foreign officials,<sup>98</sup> and, on the other hand, the foreign official obeys the regulations of his own state by virtue of administrative rather than conflicts law.<sup>99</sup>

An important doubt has been raised, however, concerning the equivalence of the institutions for securing evidence. In France, from Roman times, and in many other countries by old, if less venerable, tradition, notaries form a veritable profession of accepted standing with proper education, organization, and discipline. Their intervention in the drawing of minutes and records implies a certain investigation into the physical and mental state of the parties appearing and affords certain guarantees beyond the identification of persons. The question is whether notaries public or other officers

<sup>96</sup> 56 Stat. 1376, arts. V, IX, X, 36 Am. J. Int. Law (1942) Supp. at 195, 196. See *supra* p. 196 n. 115.

<sup>97</sup> 2 LAINÉ 409 § 226; DESPAGNET 663ff. § 217; Institute of International Law, Draft 1927, Annuaire 1927 III 335 art. 4.

<sup>98</sup> NEUMEYER, Annuaire 1927 III 169, 171; NUSSBAUM, D. IPR. 94; BARMAT, *supra* n. 1, 358.

<sup>99</sup> NEUMEYER, Annuaire 1927 III 170; BARMAT, *supra* n. 1, 133, 359.



in the Anglo-American countries, in Denmark, Sweden, and others, can replace a French notary or a German notary or court not only in authenticating signatures, which is unchallenged, but also in establishing a French "*acte authentique*" or a German "*öffentliche Beurkundung eines Rechtsgeschäfts*."<sup>100</sup>

In the United States, acknowledgments may be taken in all jurisdictions, before notaries or similar officers, in procedures analogous to the two elements of a European notarial document, viz., the certification by the public officer entitled to full faith, and the party's declaration, the object of the certification, which may be refuted by ordinary evidence.<sup>101</sup> The party may produce an instrument and acknowledge having signed it; by the reference in the certification and inclusion in the official record, the requirements for German notarial minutes, for instance, are literally fulfilled.<sup>102</sup> Of course, proceedings and background for such authentications vary. Also, a contract under seal is generally perfected by delivery of the instrument, whereas a civil law contract requires acceptance of the promise. Nevertheless, the European courts have generally not hesitated to accept American certifications, even in matters not permitting the use of a foreign local form, such as articles of association for a German limited partnership or a conveyance of real estate.

A special situation exists in New York. An opinion of a New York Attorney General has encouraged the notaries to adjust their declarations and attestations completely to the requirements for proper recordation in any foreign state.<sup>103</sup> The notary does not assume responsibility for the validity

<sup>100</sup> The problem has been noted with the request of inquiry by 1 FRANKENSTEIN 536; RAAPE 165; M. WOLFF, IPR. 78. Cf. Clunet 1910, 478.

<sup>101</sup> GLASSON et TISSIER, 2 Traité de procédure civile (ed. 3, 1926) 679 § 603; DALLOZ, 9 Répert. Pratique 392ff. §§ 140ff.

<sup>102</sup> Germany: Law on Voluntary Jurisdiction § 176.

<sup>103</sup> State of New York, Annual Report of the Attorney General (1941) 458.

of his act, nor would the county clerk attest to more than the genuineness of the notary's signature and his qualification to act as notary in the state. Nevertheless, the act may come fairly close to foreign models. It is surprising, though, and may stir doubts abroad, that the legal basis of this practice, notable in itself, should be found in a clause of the New York notary law dealing only with bills of exchange and promissory notes.<sup>104</sup> It may be timely to suggest that these provisions be expressed in a separate clause when a future law is drafted.

## 2. Form Agreeable to *Lex Loci Contractus*

The proper meaning of the rule, *locus regit actum*, goes farther than the mere substitution of a foreign solemnity for the domestic formality. Limitations upon such replacement often have been attempted, but provoked such unanswerable questions as whether an English will of a Frenchman attested by two witnesses, or a holographic will of a Frenchman made in Louisiana in the presence of his wife, may be recognized in France as an "*acte authentique*,"<sup>105</sup> or, after all, what "*acte*" is "*authentique*" and what is not.<sup>106</sup> As the rule has come to be interpreted, in the common opinion, no other solemnity is needed than that required at the *locus*, and none, if the transaction takes place in a jurisdiction where

<sup>104</sup> Executive Law, Consolidated Laws of New York 1909, Vol. 2, c. 18 § 105 (1) (Book 18, Executive Law, McKinney 1916): "A notary public has authority: 1. Anywhere within the state to demand acceptance and payment of foreign and inland bills of exchange and of promissory notes, and may protest for the non-acceptance or non-payment thereof, to exercise such powers and duties as by the law of nations and according to commercial usage, or by the laws of any other government, state or country, may be performed by notaries." Only the following subsection (2), Consolidated Laws of New York 1909, Vol. 2, c. 18 § 105 (2) (Book 18, Executive Law, McKinney 1916) and Laws 1943, c. 333, concerns the power to take affidavits and to certify the acknowledgment and proof of deeds and other written instruments.

<sup>105</sup> Long ago the courts answered wisely in the affirmative; Cass. (civ.) (Feb. 6, 1843) S. 1843.1.209; Cass. (req.) (July 3, 1854) S. 1854.1.417.

<sup>106</sup> On this dispute, especially among Dutch authors, see BARMAT, *supra* n. 1, 352ff.

no formality is necessary.

Thus, under the Civil Code of Quebec, a promise to make a gift needs notarial form, and the original is to be kept of record; but the same section of the Code expressly recognizes execution validly made outside the province without notarial form.<sup>107</sup>

*Public policy.* But does public policy of the law governing the contract not react unfavorably, especially if it happens also to be the law of the forum? Can a law requiring certain acts to be clothed in writing and especially ordaining recording by public instrument, in order to secure serious deliberation before the deal and reliable evidence after it, simply be avoided by the parties going abroad? The objection has been voiced in various ways by Paul Voet and later authors, refuted by Waechter and Savigny, and repeated again by modern writers up to Niboyet and Frankenstein.<sup>108</sup> Several Latin-American codes, mentioned earlier, have been inspired by similar ideas.<sup>109</sup> To this, the reply has always been<sup>110</sup> that opportunities to obtain consular authentication, though useful, are insufficient, that the old customary rule precisely intends to give the parties the right to conclude their transaction under any sovereign, and that the privilege given to the parties serves international business and security. It may be admitted that the doubt has some foundation in such

<sup>107</sup> Quebec: C. C. art. 776. Even a petitory action was maintained on a deed of sale of Quebec land made under private signature in Chicago, Brosseau v. Bergevin (1905) 27 Que. S. C. 510; 3 JOHNSON 332.

<sup>108</sup> See P. VOET, *op. cit. supra* n. 12; FOELIX (ed. 1, 1843) 96 § 58, (ed. 3) § 82, I and IV with citations; 2 LAURENT §§ 240 ff., 6 *id.* §§ 417 ff.; NEUBECKER 79; NIBOYET 661 § 537; 1 FRANKENSTEIN 520 ff.; ECONOMOPOULOS in 2 Acta, International Academy of Comparative Law (1935) Part 2, 522.

<sup>109</sup> *Supra* n. 35; see for instance, BEVILAQUA 259 ff. commenting on Brazilian law. The dominant liberal rule, however, is adopted, for instance, in Argentina, see S. Ct., 21 Fallos 251, 23 *id.* 526; 32 *id.* 118.

<sup>110</sup> WAECHTER, 25 Arch. Civ. Prax. (1842) 413; SAVIGNY § 381, GUTHRIE in his translation 324 note (n) discussing English law; 2 WHARTON 1463 § 695; 1 BAR 350; SURVILLE 301 Nos. 190 ff.; WALKER 224; 2 ARMINJON 134 § 59; FEDOZZI 250. For wills in particular, see WEISS, 4 Traité 647 ff.; FEDOZZI 253.

vital matters as recognition of children and perhaps also marriage contracts. But the tutorial concern of legislation for persons engaging in a surety agreement, a promise to make a gift or an obligation to convey land must not extend over the entire world. Even though parties could temporarily go abroad for the sole purpose of obtaining an easier mode of contracting, the establishment of an exception for the repression of such evasion<sup>111</sup> would open the door to inquisitions harmful to the great task of "*locus regit actum*."

The French Court of Cassation, indeed, although always particularly wary of the observance of French law by French nationals, has not hesitated to recognize in two leading cases a marriage contract made in Constantinople and a donation made in Canada, both formally valid according to the respective local laws but not in compliance with the French Code; ordinary obligatory contracts are included by an obvious *argumentum a fortiori*.<sup>112</sup>

Also in the United States, although a few courts have not been certain how to treat their domestic statutes of frauds, if such a court should decide to construe its statute as non-procedural, it would hesitate to enforce it as an expression of public policy.<sup>113</sup>

<sup>111</sup> Recently, 2 ARMINJON 161 ff. § 68; RAAPE 189 and D. IPR. 129. The contrary dominant opinion is approved in Norwegian law by GJELSVIK, *Das internationale Privatrecht in Norwegen* (Leipzig 1935) 125.

<sup>112</sup> Cass. (req.) (April 18, 1865) S. 1865.1.317; Cass. (civ.) (June 29, 1922) D. 1922.1.127, S. 1923.1.249; NIBOYET 678ff. § 557; LEREBOURS-PIGEONNIÈRE 368 § 315; 2 ARMINJON 134ff. § 59.

<sup>113</sup> One of the few cases regarded as adopting this view, following WHARTON 1442 § 690 is *Barbour v. Campbell* (1917) 101 Kan. 616, 168 Pac. 879. See also the obiter dictum in *Farley v. Fair et ux.* (1927) 144 Wash. 101, 256 Pac. 1031. An analogous suggestion in *Franklin Sugar Refining Co. v. William D. Mullen Co.* (D. C. D. Del. 1925) 7 F. (2d) 470, 473 was reversed (C. C. A. 3d 1926) 12 F. (2d) 885. *Contra*: See *Halloran v. Jacob Schmidt Brewing Co.* (1917) 137 Minn. 141, 148, 162 N. W. 1082, 1085; *Canale & Co. v. Pauly & Pauly Cheese Co.* (1914) 155 Wis. 541, 145 N. W. 372 (*supra* p. 500); *Henning v. Hill* (1923) 80 Ind. App. 363, 141 N. E. 66; and see LORENZEN, 32 Yale L. J. (1923) at 334ff., 105 A. L. R. (1936) 652, 669ff.

### 3. Renvoi

As usual, renvoi may serve to relax a too rigid conflicts rule. Argentina decrees an imperative *lex loci contractus* for formal validity. Whether renvoi is admitted in Argentina, is an unsettled question, but it has been hypothetically resorted to in several cases.<sup>114</sup> In fact, if we suppose a contract made in Quebec, void there under the domestic law but valid under the law of New York where it is to be performed, and the parties have stipulated for New York law, a Quebec court would have to apply the *lex causae* under the optional rule *locus regit actum*. An Argentine court ought to decide in the same way by use of transmittance. But any American court should judge likewise, independently of its theories of either formal validity or renvoi. In the case where the two foreign laws involved agree in the result, foes of renvoi have perforce conceded its necessity.

### 4. Defective Form

Where parties have failed to comply exactly with both the forms of the *lex casuae* and the *lex loci actus*, the effects of nonobservance may be very different in the two laws. Accordingly, in the traditional meaning of *locus regit actum*, a party may avail himself of that law which more nearly approaches giving effect to the act.<sup>115</sup> An adverse opinion, however, mentioned earlier in connection with formally defective marriages, urges the supremacy of the *lex causae*.<sup>116</sup>

An agreement to sell land, for instance, violating the statute of frauds of both states, may be considered void in

<sup>114</sup> 2 VICO 285. The problem discussed in the text has been recognized by GJELSVIK, *supra* n. 111, at 127 and has been treated more often with respect to the form of wills.

<sup>115</sup> Cases, Vol. 1, 229 n. 121.

<sup>116</sup> NIEMEYER, *Das. IPR. des BGB.* 114; RAAPE 186, 255 and D. IPR. 128 No. 4; MANNL, 11 *Zausl.PR.* (1937) 786-806; *cf.* Vol. 1, 230.

one and merely unenforceable in the other; or void under the *lex loci contractus* because of violation of the statute of frauds and under the *lex situs* merely lacking proper evidence and curable by various events; or void at both places but creating an obligation to pay damages for reliance in one jurisdiction. Only the dominant theory is logical and practical. Why should, for instance, curing of a formal defect under the law of the place of contracting not have its full effect? If the theory of *locus regit actum* is sound in itself, its stature should not be reduced by half.

On the other hand, the dominant opinion may run into some practical difficulties in particular cases, which, however, thus far have not been experienced or discussed.

#### IV. CONCLUSION

Of all the ordinary and exceptional rules stated above, only two are susceptible of serious competition: The American application of the *lex causae* and the optional rule, *locus regit actum*, prevailing in the rest of the world. The compulsory rule in England is antiquated,<sup>117</sup> and the nationalistic Latin-American experiments deserve sharp rejection. The proposals of the Institute of International Law have attempted a compromise between governing law and local law, envisaging national prerogatives over family and inheritance law rather than the needs occurring in contracts.

The rule, *locus regit actum*, shares the fate of many older principles; it has been widely accepted but justified by conflicting theories. Sovereignty, international law, regionality of public policy, customary law, voluntary submission of the parties, vested rights, convenience of the parties, expediency for international business—each one singly and all these motives in co-operation—have been advanced as the true basis of the rules. The draftsmen of the German codification

<sup>117</sup> Cf. recently, M. WOLFF, Priv. Int. Law 454.

considered only reasons of practical convenience,<sup>118</sup> and at present this is the dominant conception. The attribution of exclusive force to the *lex causae* is opposed as a source of iniquity.

In fact, the American courts have in many cases escaped untenable results by shutting their eyes to the consequences their rulings would have on questions other than those of form. A court may be satisfied with the justice of treating an oral contract under the law of the place where it is made. But, if it operates in conjunction with a general rule that validity, or validity and effect, is governed by *lex loci contractus*, this law would have to apply also to the necessity of consideration, the capacity of a married woman to contract, the influence of misrepresentations made by an agent, the validity of a clause exempting a party from liability, and so forth. Such incidents, in their turn, have been judged in individual cases by other criteria. The Supreme Court in *Pritchard v. Norton* (*supra* p. 362) took the question of consideration away from the law of New York, the place of contracting, to Louisiana, the place of performance. Certainly, it is by no means desirable to divide the contract into fragments, instead of subjecting it to the one law of characteristic significance. But formal validity, if guaranteed by the law of the place of making as an added opportunity to grant validity under the over-all law, leaves the latter intact and satisfies practical needs. With respect to wills, the Uniform Wills Act, Foreign Executed, adopted by twelve states, has created a special rule for formalities and permits a will to be executed in the mode prescribed by the law either of the place where executed or of the testator's domicile.<sup>119</sup> Cases

<sup>118</sup> 2 ZITELMANN 143ff.; 6 Protokolle Zweiter Lesung des Entwurfs des BGB. 32-37; MELCHIOR § 155; GEILER in 1 Düringer-Hachenburg 56 n. 21.

<sup>119</sup> See for comment, WALTER W. LAND, *Trusts in the Conflict of Laws* (New York 1940) 24, 54 §§ 8, 16 and see his observation, p. 45, regarding tangible property on the alternative reference rule of most statutes.

concerning bills and notes before the Negotiable Instruments Act could best be harmonized by a permissive *locus regit actum*, as suggested by Lorenzen,<sup>120</sup> who has proposed this rule also for a Pan-American unification of conflicts law.<sup>121</sup> If the rule were adopted by the American courts, an irritating source of disturbance would disappear. The courts would gain more freedom to choose the proper law for the substance of the contract.

We have, however, realized the necessity of developing the rule so as to take care of the really typical modern cases. Whenever the laws of two or more territories are involved in the formation of a contract, to give exclusive preference to one of them is quite as wrong as to cumulate their requirements. Rather, compliance with one of the two local laws should suffice. The problem is different from the inquiries for determining the place of contracting for the purpose of finding the governing law or the law deciding whether or not the contract has been formed. The customary privilege for upholding formal validity is sound; hence it ought to be extended rather than curtailed. Consequently, in the case of contracting by correspondence, the law of the place where the offer is dispatched should suffice for determining validity of the contract, as well as the law of the place whence the acceptance is sent.

An even broader possibility has been suggested by Lainé to the effect that the law of the forum, and any other law indicated by an interest of the parties, also should be able to validate the form of a contract.<sup>122</sup> In this country, the idea of giving the law of the forum a favorable influence on validity was revived by Lorenzen with respect to the statute of

<sup>120</sup> LORENZEN, *The Conflict of Laws Relating to Bills and Notes* (New Haven, London 1919) 89; cf. KUHN, *Comp. Com.* 267.

<sup>121</sup> LORENZEN, 15 *Tul. L. Rev.* (1941) at 167.

<sup>122</sup> LAINÉ, *Clunet* 1908, 674, 681-685, 692-693.



frauds at a time when the statute of frauds was widely regarded as procedural.<sup>123</sup> The very success of Lorenzen's construction of the statute of frauds as substantive in conflicts law seems to obviate this emergency solution.

The law of the forum as such, indeed, should not compete with the others in the field of obligatory contracts, either for the sake of a permissive policy or for that of rejecting foreign transactions.

Domestic policy should not be opposed, in particular, to the free use of foreign instruments, as it is done in numerous Latin-American codes, when the solemnities required at the forum for similar transactions are lacking. Respect for foreign law should also be maintained in carrying into practice the universally recognized rule that solemnities prescribed by the governing law are replaceable by compliance with analogous local formalities. An apparent exception to this minor function of the rule *locus regit actum* exists in the United States to the extent that the statutes indicate what persons are empowered to take acknowledgments outside the state. This is probably intended to be a facilitation rather than an imposition. Usually the enumeration of the designated legal officers is extensive. Nevertheless, it would be preferable to leave their selection to the respective foreign systems and to make it clear that, as a rule, obligatory agreements do not need to comply with the domestic formalities when they are executed abroad.

<sup>123</sup> LORENZEN, 32 Yale L. J. (1923) at 333-334.

## CHAPTER 32

### Scope of the Law of the Contract

WHEN the law governing a contract, or a group of contracts, has been ascertained, what problems does it cover? In principle, notwithstanding the theories that would split the contract into segments, it should embrace all incidents of the contractual relationship.<sup>1</sup> Special rules regarding form<sup>2</sup> and those concerning the application of a personal law to capacity to contract,<sup>3</sup> have been treated earlier in this work.

This chapter, however, will discuss doubts and objections that have been raised to the rule of a unitary law for the problems arising on a contract. This discussion cannot be exhaustive, since questions of classification originate with the consideration of each special type of contract. Moreover, such topics as acts of parties modifying the obligation or transferring rights or duties, and the whole doctrine respecting limitation of actions and termination of contractual rights, cannot be expounded at this juncture.

While American conflicts literature is accustomed to ask whether *lex loci contractus*, or *lex loci solutionis*, or *lex fori* applies to a problem, we have here to speak in terms of the law of the contract, of a second law applicable to special problems, and of public policy opposing foreign law. This divergency of method causes some difficulties in the effort of comparing the solutions.

<sup>1</sup> See particularly the comparative survey as of 1917 by KOSTERS 773-779.

<sup>2</sup> *Supra* Chapter 31.

<sup>3</sup> Vol. I Chapter 4.

## I. FORMATION OF THE CONTRACT

## 1. Consent in Form

*The problem.* The municipal laws provide diverse solutions for questions such as whether an offer binds the offeror and, if so, for what length of time; whether acceptance must be declared, dispatched, arrive, or be perceived, to conclude the consent, and whether perfection of the contract has retroactive effect. Many particulars, too, vary.<sup>4</sup>

What law to apply to these questions, is a matter of both practical and theoretical interest.<sup>5</sup>

*Illustrations:* (i) *Binding force of offer.* Lorenzen<sup>6</sup> has presented the following example: A resident of New York having made an ordinary offer, without time limit or other qualification, by letter to a German in Germany, revokes it by cable a few hours after the letter is received. The addressee, knowing that under German law the telegraphic withdrawal is inoperative, at once accepts the offer. Under New York law, the offer is revocable until dispatch of acceptance and the contract fails to come into existence. If, according to Lorenzen's suggestion, the *lex fori* were to apply, the parties would be held to the contract in any German court but not in any American court.

(ii) *Acceptance by silence.* A seller in New York offers merchandise to a firm in Liverpool with which he frequently has business relations and which had declared a desire for these particular goods. The addressee does not answer. Courts in the United States, and decidedly many Continental courts, are more inclined than English courts to imply acceptance by silence. In an analogous case, a Swiss seller and a French

<sup>4</sup> For comparative law see RABEL, 1 *Recht des Warenkaufs* 69-108; International Institute for the Unification of Private Law, *De la formation des contrats entre absents, Étude Préliminaire* (mimeographed) S. d. N.—U. D. P. 1935, Étude XVI.

<sup>5</sup> EDUARD WAHL, 3 *Zausl.PR.* (1929) 775; ACHENBACH, *Der briefliche und telegraphische Vertrag im vergleichenden und internationalen Privatrecht* (Hamburg 1934).

<sup>6</sup> LORENZEN, 31 *Yale L. J.* (1921) at 53.

buyer had negotiated through the seller's agent in Paris; the agent had no authority to conclude the bargain, and the seller failed to give an express confirmation. The Swiss Federal Tribunal nevertheless held the contract to have been completed under Swiss law as the *lex loci contractus*.<sup>7</sup>

(iii) *Loss of letter of acceptance*. A merchant in Paris by letter to a firm in New York offers to buy certain goods; the letter of acceptance is lost in the mail. The New York seller sues on the basis of a contract perfect under New York law. The French party denies the contract according to French law.

(iv) *Delayed answer*. In a Norwegian case,<sup>8</sup> A in New York, owning land in Norway, by a letter to B in Norway, offered to sell the land but limited the time for acceptance. B answered affirmatively in time, but his letter was delayed in the mail and reached the offeror when the time limit, and let us suppose, a reasonable time for receiving an answer, had expired. A failed to make any reply. The majority of the Supreme Court in Oslo granted B's action against A, by application of Norwegian law, because A should have notified B of the delay or otherwise should have complied with the contract. The minority dissented on the ground that New York law as the law of A's domicile applied.

*Conflicts rules*. Many approaches have been tried. Beale, as well as the Swiss Federal Tribunal, according to his usual method, applies the *lex loci contractus*,<sup>9</sup> which, however, in relation to foreign countries leads nowhere.<sup>10</sup> Continental writers have proposed to resort to the national law of the offeror,<sup>11</sup> or the law of his domicile in several variants.<sup>12</sup>

<sup>7</sup> BG. (Sept. 28, 1912) 38 BGE. II 516, 519.

<sup>8</sup> Norwegian S. Ct. (1924) 2 Z.ausl.PR. (1928) 873 No. 51; HAUDEK 67 approves the majority vote and RAAPE, D. IPR. 268 No. 3 the dissident vote.

<sup>9</sup> 2 BEALE 1174-1176; Restatement § 332 (c).

Swiss BG. (June 9, 1906) 32 BGE. II 415; (Sept. 28, 1912) 38 BGE. II 516, 519.

<sup>10</sup> *Supra* Chapter 30, p. 456.

<sup>11</sup> BARTIN, 2 Principes 89.

<sup>12</sup> German RG. (Nov. 20, 1902) 53 RGZ. 59 (isolated); NUSSBAUM, D. IPR. 239; BATIFFOL 345 § 393 and n. 2 suggesting that a prolonged sojourn may replace domicile.

Another doctrine, following the usual way out of embarrassment, cumulates the requirements of both laws involved.<sup>13</sup> But more often the true emergency solution, *lex fori*, has been suggested.<sup>14</sup>

Only the German courts have been in position to face the problem squarely.<sup>15</sup> They apply the same law that would govern the contract if it were valid.<sup>16</sup> Where the automatic force of the law of the place of contracting is eliminated, this is the natural solution, approved by those modern writers who are not afraid of an alleged vicious circle, nor of the existence of a contract which may be denied by the domiciliary law of one party.<sup>17</sup>

*Illustration:* (v) It is litigious whether a contract has been effectively agreed upon between S, operating a saw-mill in A, State X, and P, a manufacturer of furniture in B, State Y, to sell four carloads of lumber, deliverable at a certain date on the side tracks of the railway depot in A. Because of this determination of the place of delivery, as will be submitted in the third volume of this work, the law of State X governs the contract. This includes all questions of consent in form as well as in fact. There is no inquiry into such questions as which party has first made an offer or where acceptance has been signed or mailed or received.

A similar result is perhaps viewed in Brazil by C. C. art. 1087; the contract is made where the offer has been made, and Introd. Law (1942) art. 9 § 2: where the offeror resides.

<sup>13</sup> LEWALD No. 295; PACCHIONI 329 § 10; for cumulation modified by favor to validity ACHENBACH, *supra* n. 5, criticized by WAHL, Book Review, 10 Z.ausl.PR. (1936) 1070.

<sup>14</sup> LORENZEN, 31 Yale L. J. (1921) at 53; PILLET, 2 Traité 180-181; DIENA, 2 Princ. 256; HAUDEK 91. *Contra*: PACCHIONI 328 § 10.

<sup>15</sup> Statement by BATIFFOL 346 § 394 *bis* and n. 1.

<sup>16</sup> This is the law intended by the parties or the law of the place of performance. See RG. (Jan. 3, 1911) 55 Gruchot's Beiträge 888; (May 15, 1917) Warn. Rspr. 1917, 267; (Jan. 16, 1925) 34 Z.int.R. 427; (March 13, 1928) IPRspr. 1928 No. 1; (May 12, 1928) Leipz. Z. 1928, 1550; (Feb. 3, 1933) IPRspr. 1933, 19 No. 10.

The *lex loci solutionis* has been also advocated in Argentina by ZEBALLOS in 2 Weiss-Zeballos 295 n. (a).

<sup>17</sup> WAHL, 3 Z.ausl.PR. (1929) 788-800; RABEL, *id.* 753.

Writers following this theory have been preoccupied, it is true, with hardships resulting, for instance, if an American party, contrary to his own law, should be declared bound by an offer, as in the above example (i) under German law, or an English party bound by his silence as in the above example (ii). One proposal is that the court of such a party's domicile might free him on the ground of public policy.<sup>18</sup> This, however, would not help, if the case were to be tried in the other court, and would defy the purpose of the rule. A more attractive suggestion has been to consult the domiciliary law of each party, not for all, but for the single question, whether his conduct presents any declaration that might be a subject matter for legal construction.<sup>19</sup> The underlying argument of equity, however, is doubtful in view of the interest of the other party, which, supposedly, would be protected by his own law. In addition, English and American courts cannot be expected to follow a personal law.

Indeed, the apparent hardship disappears, if the modern principles of interpretation are duly transferred into the field of international business transactions. A German court under German law cannot treat a proposal to contract as a binding offer, if the offeror must be presumed to have intended the contrary.<sup>20</sup> An offer by a New York firm, in the absence of particular circumstances, can not be understood as would an offer of a German to another German. Nor should an offer by a New Yorker to a Norwegian, under express limitation of time, be construed as embodying the conception that he must repudiate a belated acceptance. Under any law whatever, informal declarations ought to be construed according

<sup>18</sup> BATIFFOL 346 § 394; RAAPE, D. IPR. 266 V.

<sup>19</sup> M. WOLFF, IPR. 75; WAHL, 3 Z.ausl.PR. (1929) 800; RABEL, *id.* 754; K. Th. KIPP, in Fischer-Henle-Titze Bürgerliches Gesetzbuch (1932) 1109 II 1; RAAPE, D. IPR. 267.

<sup>20</sup> See also WAHL, 3 Z.ausl.PR. (1929) 801. For an analogous appraisal of the question whether a proposal is meant as an offer, RAAPE, D. IPR. 269 No. 5.

to the principles of good faith, considering the laws and usages of the place where the declarant lives. Certainly, if a declaration is sent out into the world, the sender is not entitled to expect that the effect will always be the same as under the law of his domicile. But this does not affect our cases. Wise judges are careful not to subject foreign promises to domestic standards, unless submission to them appears to be required by usage.

## 2. Consent in Fact

*The problem.* Error, fraud, duress, and simulation are everywhere grounds for nullity or voidability, yet circumstances vary.<sup>21</sup> Error, in particular, may be either more or less liberally allowed to vitiate the consent. The most important difference of laws resides in the question whether error must be caused by misrepresentations of the other party or at least the latter must have been unaware of the error. In addition, the various shades of invalidity are divergently regulated, and so is the liability of the party avoiding a contract on the ground of his own mistake. The following examples may illustrate the ensuing conflicts problem:

(i) A, a resident of British Columbia, acquired what in his opinion were treasury bonds of a corporation in the state of Washington, but were actually common stock shares, the holder of which was liable under the corporate charter for certain payments.

The Canadian court refused to apply the law of the charter, using the argument that, because of the seller's misrepresentation, A had never become a shareholder under the law of British Columbia.<sup>22</sup> The report of the case does

<sup>21</sup> For comparative municipal law see YEHIA TAG-ELDINE, *Le dol français et la misrepresentation anglaise, contribution à l'étude de la théorie du consentement et de ses vices*. (Vol. XVI Bibliothèque de l'Institut de Droit Comparé de Lyon, 1926).

<sup>22</sup> *American Seamless Tube Corp. et al. v. Goward* [1930] 3 D. L. R. 870 (B.C. S.C.); fortunately, the court adds that the contract would have been voidable under California law, too.

not state why this law applied, but probably it was taken for granted that the contract was made there and that the *lex loci contractus* governed the entire contract. A comparable case came recently before the Supreme Court of the United States.<sup>23</sup> A mutual insurance company, chartered in New York, became insolvent. Assessments were adjudged in proceedings in New York against the policy holders regarded as members under New York law, and suit for enforcement was brought against residents of Georgia at their domicile. The Georgia Supreme Court refused enforcement on the ground that the policy was a contract made in Georgia and therefore governed by Georgia law.<sup>24</sup> Under the New York statutory law, the policy holders were liable to the assessment, but according to the law of Georgia they were deemed not to have become members of the company, a clause on the back of the policy being insufficient to produce this effect. Although in this case protection of residents was conspicuous, the reasoning was simply based on the law governing the contract.

(ii) In 1897, a German reinsurance company in the Rhineland, the Aachener Rückversicherungs A.G., consented to a reinsurance contract for three-fifths of a fire risk in Japan with an insurance company of Hamburg, through an agreement made in Japan by the agents of both parties. The company in Aachen contested the validity of the agreement because its agent had not been made aware of the unusual fact that the other two-fifths of the risk had been covered previously by another reinsurance. The Reichsgericht applied articles 1110 and 1117 of the French Civil Code, in force in the Rhineland at the time of contracting, as the law of the domicile of the debtor.<sup>25</sup>

*Conflicts rules.* Aprioristic theory, again, has postulated that the personal law of the party whose assent is concerned, should govern,<sup>26</sup> or that the *lex loci contractus* must neces-

<sup>23</sup> Pink v. A. A. A. Highway Express, Inc. (1941) 314 U. S. 201.

<sup>24</sup> Pink v. A. A. A. Highway Express, Inc. (1941) 191 Ga. 502, 13 S. W. (2d) 337.

<sup>25</sup> RG. (Dec. 5, 1902) 53 RGZ. 138.

<sup>26</sup> For the national law among others: 8 LAURENT 228-229 § 158; PILLET,



sarily determine this problem of validity,<sup>27</sup> but courts in England,<sup>28</sup> the United States, and Germany have instinctively applied the same law that would govern the contract if it were valid. In the United States, this has been, as usual, either the law of the place of contracting,<sup>29</sup> that of the place of performance,<sup>30</sup> or the law intended by the parties.<sup>31</sup> In Germany, the Supreme Court and other courts in the last decade have firmly upheld the law of the contract,<sup>32</sup> and finally this attitude has found the deserved theoretical recognition.<sup>33</sup> Frail French authorities at present are understood as aiming at the same effect.<sup>34</sup>

The last international draft on conflicts rules concerning sales of goods has adopted this view in applying even the law stipulated by the parties to the consent problems.<sup>35</sup> Occasion-

Principes 448 § 238; BARTIN, 1 Principes 175, 177, 2 *id.* 60; AUDINET, 1 Mélanges Pillet 78; 1 FRANKENSTEIN 572. For the domiciliary law, PILLET, 2 Traité 289 § 537; LEWALD 239 No. 296. *Contra*: WEISS, 4 Traité 392 n. 4; KOSTERS 774; and decisively BATIFFOL 336ff. §§ 381-384.

<sup>27</sup> FOOTE 402; 2 BEALE 1225; ROLIN, 1 Principes 481 § 291; 2 ARMINJON 234 II § 97.

Switzerland: BG. (April 10, 1896) 22 BGE. 471, 483; 32 *id.* II 416; 38 *id.* II 519; Trib. com. Zürich (Feb. 14, 1937) Bl. f. Zürch. Rspr. 1937, 164 No. 85, cited 12 Z.ausl.PR. (1939) 594.

The German Reichsgericht argued similarly in two or three isolated cases.

<sup>28</sup> See M. WOLFF, Priv. Int. Law 445 § 421; BATIFFOL 341 § 387.

<sup>29</sup> Cases: 2 BEALE 1225 § 347.1 but in *Elbro Knitting Mills v. Schwartz* (1929) 30 F. (2d) 10, the "Michigan contract" was not questioned.

<sup>30</sup> Cases: 2 BEALE 1226 § 347.1 ns. 1-6.

<sup>31</sup> *Union Central Life Ins. Co. v. Pollard* (1896) 94 Va. 146, 26 S. E. 421.

The Netherlands: Rb. Haag (June 6, 1935) W. 1936, 402.

<sup>32</sup> RG. (Dec. 5, 1911) 78 RGZ. 55: sale of membership in a limited private company, error on the money paid in; OLG. Hamburg (Sept. 27, 1918) Hans. GZ. 1918 HBL. No. 92, *aff'd*, RG. (March 11, 1919) 95 RGZ. 164: sale of nuts, the price payable in Vienna, Austrian law applied to the excusable ignorance by the German buyer of a German war decree; RG. (Oct. 30, 1926) 39 Z.int.R. 276, 281, *Revue* 1928, 523 (duress); (June 13, 1933) IPRspr. 1933, 31 (fraud); and many older cases, see the list established by LEWALD 240 No. 297.

<sup>33</sup> WAHL, 3 Z.ausl.PR. (1929) 782; NUSSBAUM, D. IPR. 237; BATIFFOL 340 § 386; see also NUSSBAUM, Principes 178, and ARMINJON, 3 Travaux du comité français de droit international privé (1937) at 94.

<sup>34</sup> BATIFFOL 343 § 389.

<sup>35</sup> See 7 Z.ausl.PR. (1933) 957 art. 2 (3).

ally courts have resorted to the law of the forum. This happened in England, when the foreign law did not seem to guarantee annulment of a contract made under duress,<sup>36</sup> in a case of the German Reichsgericht disregarding the Turkish law on employment,<sup>37</sup> and in one or two American insurance cases involving misrepresentation of the insured.<sup>38</sup> The most characteristic of these decisions is that by the English Court of Appeals in *Kaufman v. Gerson*. The defendant, a woman, had promised the plaintiff, her husband's creditor, to pay the debt in consideration of his promise not to prosecute her husband criminally. Under English law, the contract would have been bad because its object was to stifle a prosecution and it was obtained by coercion. However, the places of contracting and of performance made it a French contract, and under French laws, supposedly, the promise was valid. The court argued, however, that enforcement in England would violate the rule that the plaintiff must come into court with clean hands. The decision deserves the severe criticism it has suffered,<sup>39</sup> since opinions are and may well be divided on the existence of unlawful coercion when a creditor attempts to obtain satisfaction of his valid claim by threatening legal sanctions.

<sup>36</sup> *Kaufman v. Gerson* [1904] 1 K. B. 591, Clunet 1905, 1063; Société des Hôtels Réunis, Société Anonyme v. Hawker [1913] 29 T. L. R. 578. See also *Hope v. Hope* (1857) 8 De G. M. & G. 731 (agreement illegal according to English law).

<sup>37</sup> RG. (Oct. 30, 1926) 39 Z.int.R. 276, Revue 1928, 523.

<sup>38</sup> *Fidelity Mutual Life Ins. Co. v. Miazza* (1908) 93 Miss. 18 at 36 and 422 at 435, 46 So. 817 at 818 and 48 So. 1017 at 1018. In *John Hancock Mutual Life Ins. Co. v. Yates* (1935) 50 Ga. App. 713, 179 S. E. 239, the court operates on the assumption that the materiality of representations made by the insured in his application affects the remedy only and therefore is to be decided under the law of the forum.

<sup>39</sup> DICEY, Appendix, Note 3, 882; FALCONBRIDGE, *The Law of Banks and Banking* (ed. 5, 1935) 902; 3 BEALE 1647 § 612.1; GOODRICH 260 n. 9; Notes, 79 U. of Pa. L. Rev. (1931) 635; 33 Col. L. Rev. (1933) 508. On the problems in substantive American law, see the remarks of DAWSON, "Economic Duress and the Fair Exchange in French and German Law," 11 Tul. L. Rev. (1937) 345, 359.

## 3. Want of Consideration

The common law requirement of consideration has a parallel in the much-debated requirement of the French Civil Code (arts. 1108, 1131) by which an obligation must have *une cause licite*: "An obligation without cause or on a false cause or on an illicit cause can not have any effect."<sup>40</sup> To believe a considerable part of the French doctrine,<sup>41</sup> this provision includes the rules that in onerous contracts a promise must have an actual counterpart in a promise or in a giving or doing by the other party, and that on principle, with exceptions, obligations ought not to be separated from their economic background. Central European systems, however, use other forms of thinking that do not need this general requirement.

Any law governing the contract will naturally determine the requirement of consideration.

The Supreme Court of the United States in *Pritchard v. Norton* applied the law of the place of performance, according to the presumed intention of the parties, thus preventing the contract from being held invalid for want of consideration under the *lex loci contractus*.<sup>42</sup> There are parallels to this decision in England<sup>43</sup> and France.<sup>44</sup> The American cases re-

<sup>40</sup> For comparative municipal law, see LORENZEN, "Causa and Consideration in the Law of Contracts," 28 Yale L. J. (1919) 621 at 623. On the peculiar combination of both in Louisiana, see SNELLINGS, "Cause and Consideration in Louisiana," 8 Tul. L. Rev. (1934) 178.

<sup>41</sup> See on the vast controversies, ESMEIN in Planiol et Ripert, 6 *Traité Pratique*, in particular his own thesis at 350 § 252.

<sup>42</sup> (1882) 106 U. S. 124.

<sup>43</sup> *British Controlled Oilfields v. Stagg* (1921) 66 Sol. J. 18 (applying English law expressly stipulated for in the contract); *In re Bonacina Le Brasseur v. Bonacina* [1912] 2 Ch. 68, 73 (validity under Italian law conceded although the action is dismissed on other grounds).

<sup>44</sup> App. Paris (Feb. 28, 1935) *Revue Crit.* 1935, 748 applying French law as *lex loci solutionis* to a German-created bill of exchange, see comment by BATIFFOL, *Revue Crit.* 1937, 434. The Court of Cassation (req.) has affirmed the decision, (Dec. 14, 1937) *Nouv. Revue* 1938, 131, on the basis of German *lex loci contractus*, in a laconic reasoning, well explained in the note *ibid.*: under German law the bill was valid but the action could be refuted by pleading that the plaintiff would be enriched without cause.

ferring the question to the *lex loci contractus* seem to consider this law as governing the entire contract.<sup>45</sup> For German courts, the application of the law of the contract follows as a matter of course.<sup>46</sup>

Recently, the Tribunal de la Seine dealt with several strange agreements made in New York by German refugees, whereby a man promised huge sums to his wife and daughter, without any visible motive and as was supposed, with no intention of making a gift. The court thought it probable that the promise was void under the German law, applicable as presumably intended by the parties, but added that, if approved by German law, the agreement would be void under French imperative public policy.<sup>47</sup> This is one of the easy ways of dealing with obscure facts; the case could have been conveniently solved under the German Civil Code.

## II. NATURE AND EFFECTS

### I. The Nature of the Contract

The law applicable to an obligatory contract should determine what kind of a contract is made.

*Illustration.* Before the German Civil Code came into force, a promise to deliver goods to be manufactured with materials owned by the promisor was considered in the courts following common (Roman) law as a sales contract, whereas the Prussian *Landrecht* assumed that a contract for work and labor entitled the customer to cancel his order. In several cases one party was domiciled in the territory of the common law and the other in that of the *Landrecht*.

Instead of treating each party as debtor according to his own law, as was done in other cases, the German Supreme

<sup>45</sup> BATIFFOL 353 § 408 n. 5.

<sup>46</sup> Bay. ObLG. (July 6, 1904) 5 Bay. ObLGZ. 357 (force of an I. O. U. not indicating the ground of obligation); OLG. München (April 13, 1929) Zeitschrift für Rechtspflege in Bayern (1929) 365 cited by LEWALD 244 No. 302 (consideration required by English law). See also *supra* p. 362 n. 15.

<sup>47</sup> Trib. civ. Seine (July 5, 1939) Revue Crit. 1939, 450.

Court subjected the entire contract to the law of the promisor.<sup>48</sup> No one thought of resorting to the law of the forum.

A deterrent example of a contrary reasoning may be found in a case of the Swiss Federal Tribunal, influenced by the two unnatural theories which recommend splitting the contract and characterizing its nature according to the *lex fori*.<sup>49</sup>

A resident Swiss, having executed by letter an acknowledgment of a loan of £3250, to an English woman domiciled in Paris, demurs to an action for recovery, brought by an assignee, because he has not received the money. What law determines his plea? In this case, suitable for an elementary law class, the Federal Tribunal argued as follows: First, it is considered that the making of a loan contract, under French law, requires as in Roman law the transfer of the money to the borrower as an essential prerequisite; that under Swiss law the mutual consent of the parties suffices to create contractual rights of the borrower to receive and of the lender to recover the money; and that English law is still different, the court using an unusual term probably meaning that English law does not make a promise to lend or borrow specifically enforceable. The court considers, further, that under the French approach no contract has been made, unless the money was given, hence, the question would be one of formation, governed in Swiss conflicts law by the *lex loci contractus*. If, however, under the Swiss construction, the contract originated independently of delivery, the issue would be merely one of the requisites for recovery, pertaining to the "effects" and determined by the law chosen by the parties or, subsidiarily, by that of the place where repayment is due. In this dilemma, remembering that a court characterizes problems according to its own domestic law and citing Nussbaum, the Federal Tribunal resorts to the Swiss construction of a loan as a consensual contract and reaches the law of the place of performance which is—the French law.

Thus, because under the Swiss Code of Obligations a loan

<sup>48</sup> RG. (May 13, 1891) 2 Z.int.R. 587. For other German cases, see LEWALD 248 No. 306.

<sup>49</sup> BG. (Nov. 7, 1933) 59 BGE. 397.

may originate by mere consent, the French Civil Code is applied, under which it may not! Even the harmful division between validity and the effects of contract can be worked out in a more suitable way than by the domestic construction. It was the task of the court candidly to interpret its own dubious conflicts rule and to state, once and for all, whether the problem is attributable to "validity" or to "effects." The Restatement, at least, does not fail to explain that any requirement for making a promise binding is determined by the law of the place of contracting (§ 332,d).

The law of the contract, no doubt, should include all requisites for validity as well as the legal category of the transaction and, therefore, its legal effects.

## 2. Intended and Legal Effects

Most courts do not hesitate to include interpretation of a contract in the law which governs the whole of the contract. They also apply this law to the questions, who obtains rights through the contract, and what is the object of these rights. For it is plainly not feasible to consult two different laws for determining the extent of the contractual duties, the one when they are to be inferred from construction of the parties' intention, implied in fact, and the other when they flow from legal rules completing an agreement, implied in law.

In the narrower domain of interpretation, the natural conception was adopted in this country over a century ago by the Supreme Court of the United States. When two sureties in New Orleans signed a bond payable in Washington, D.C., the court held that, in the absence of a stipulation to the contrary, their liability was joint, according to the common law of the District rather than divided in half under Louisiana law.<sup>50</sup> Nobody then doubted that the bond was subject as

<sup>50</sup> Cox and Dick v. U. S. (1832) 31 U. S. (6 Pet. S. C.) 172.

a whole to the law of the place of performance, a rule also applied by the Supreme Court in *Pritchard v. Norton*.<sup>51</sup>

Analogous results may be found in many decisions relating to legal effects of contracts.

Nevertheless, the Restatement, influenced by a few cases, has confused the matter. It determines "the nature and extent of the duty for the performance" by the *lex loci contractus* (§ 332, f), but declares "the duty for the performance" to be "discharged by compliance with the law of the place of performance." (§ 358). It is instructive to see how hard Stumberg tries to apply these contradictory tests.<sup>52</sup> He deals with an Oklahoma case<sup>53</sup> where a contract granting an automobile agency was made in Michigan with the Ford Company and the agency was to be maintained in Columbus, Ohio. The plaintiff in obtaining the contract acted for the benefit of a company in which he took an altruistic interest and invested money to help manage the agency. The court applied Michigan law as the *lex loci contractus* to the "execution, interpretation, and validity." Hence, the breach of the contract by the Ford Company was found not to entitle the third beneficiary to sue for damages, nor the promisee who sued as assignee. The decision, as Stumberg recognizes, might have been otherwise, if the center of the contract had been sought in Ohio without clinging to the mechanical use of the *lex loci contractus*, although perhaps the facts relevant for equity were not fully published. However, Stumberg wonders whether this problem would fall under the "extent of the duty" or the "compliance with the duty," especially the determination of "the person to whom performance shall be rendered" (§ 366), and asks: "Is it practically possible to draw a line sharply dividing the extent of the obligation of

<sup>51</sup> *Supra* n. 42.

<sup>52</sup> STUMBERG 220 n. 74 continued on p. 221.

<sup>53</sup> *Brown v. Ford Motor Co.* (C. C. A. 10th 1931) 48 F. (2d) 732.

the contract from its performance?" Our answer has been given before and is strictly: No.<sup>54</sup>

### 3. Interpretation of Terms

*Rules of interpretation.* It is a settled principle that rules of interpretation contained in the law governing the contract must be applied to the exclusion of those of the *lex fori*.<sup>55</sup> But doubts have long been raised against this principle.<sup>56</sup> In fact, if the contract is mechanically governed by the law of the place of contracting, there is no consideration provided for the circumstances under which parties envisage performance in another country. Moreover, we might hold this principle to be objectless to the extent that the various rules of interpretation are superseded by the proposition recognized in national laws as well as in the international practice as a "general principle," that we must always look for the real and harmonious intention of the parties when they bound themselves.<sup>57</sup> On this basis, the court of any country must pay

<sup>54</sup> *Supra* p. 450; and see the vain efforts in the Restatement itself, § 332 comment c, to solve the "difficult problem" of separation of duty and performance. For another consequence see hereafter p. 537.

<sup>55</sup> STORY §§ 272, 280.

California: C. C. § 1646, *cf.* *Monarch Brewing Co. v. George J. Meyer Mfg. Co.* (C. C. A. 9th 1942) 130 F. (2d) 582. The courts adhering to the *lex loci contractus* commonly enumerate construction and interpretation as well as validity as subject to this law.

England: *In re Société Intercommunale Belge d'Électricité*, *Feist v. The Company* [1933] Ch. 684, 690; *St. Pierre v. South American Stores Ltd.* [1937] 3 All E. R. 349, 351, 355.

France: *Lex loci contractus*, *Cour Paris* (April 5, 1905) *Clunet* 1906, 170; *Trib. civ. Seine* (March 12, 1908) *Clunet* 1908, 1132; WEISS, 4 *Traité* 348, 364; ROLIN, 1 *Principes* 429 § 231, 547 § 344, 550 § 346.

Germany: RG. (March 15, 1892) *JW.* 1892, 220 No. 27; (April 6, 1911) 24 *Z.int.R.* 305.

Código Bustamante, art. 184 with exceptions.

In principle, though with exceptions, the law governing the contract also includes the force allowed to *commercial usage*, see 1 *Recht des Warenkaufs* 62; this problem will be studied with particular reference to sales contracts.

<sup>56</sup> See 2 *BAR* 34; 7 *LAURENT* 582 §§ 479-482; *DESPAGNET* 896 § 302; *SURVILLE* 332 § 219; *VALÉRY* 978 §§ 678ff.; all inspired by *BOULLENOIS*.

<sup>57</sup> Permanent Court of Arbitration, decision between the Netherlands and



natural and necessary regard to the foreign origin of an instrument.

*Ascertainment of true meaning.* Thus, in a leading English case, a Brazilian in Brazil executed in the Portuguese language a power of attorney, granting authority to a London broker to buy and sell shares. The Court of Appeals, before deciding what law determined the extent of the authority, held that the exact meaning of the declaration ought to be ascertained through interpreters and experts according to the language and the habits at the place of transaction.<sup>58</sup> A charter party between two German corporations contained clauses usual in English maritime trade, including an exception clause, a cessor of liability clause, and an indemnity clause.<sup>59</sup> In another case, a vessel was insured, both parties being German corporations doing business in New Guinea, with the general conditions attached in English. (Institute Time Clauses).<sup>60</sup> In both cases, the German Supreme Court stated the meaning of the English original, although the contract was governed by German law. Indeed, in all cases of party statements and agreements, the true meaning must be discovered under full observation of all circumstances. This may be supposed to be provided for in practically all municipal laws<sup>61</sup> and does not touch conflicts problems.

*Reference to local conceptions.* Neither is conflicts law affected, when it appears that parties expressly or probably re-

Portugal in the Island of Timor case, The Hague (June 25, 1914), in The Hague Court Reports (ed. J. B. Scott 1916) 354, 365, 382.

<sup>58</sup> *Chatenay v. Brazilian Submarine Telegraph Co., Ltd.* [1891] 1 Q. B. 79, 82 per Lord Esher, M. R., 85 per Lindley, L. J.

<sup>59</sup> RG. (May 22, 1897) 39 RGZ. 65.

<sup>60</sup> RG. (November 7, 1928) 122 RGZ. 233.

<sup>61</sup> M. WOLFF, *Priv. Int. Law* 458 § 432 calls attention to the English rule of construction that words of an instrument must be interpreted from the context, or understood in their plain and literal meaning, and requires that this rule be not applied in interpreting a contract governed by French, German, or Swiss law. This is correct; but the same is true and recognized by the English courts when the instrument is executed abroad, irrespective of the applicable law.

ferred to the conceptions of a place other than that of contracting. It has been held that in a fire insurance policy an indication of time was to be computed according to the law of the place where the property covered was burned,<sup>62</sup> and with respect to a contract of accident insurance prescribing that packing should be done in the presence of an adult, that who was an adult ought to be determined by the law of the place where the packing was supposed to be done.<sup>63</sup> To explain such decisions as though they referred to the law of the place of performance,<sup>64</sup> is inaccurate. The packing firm had nothing to "perform," nor had the insurance company to "perform" at either of the two places mentioned. Also, it could well have been that a commercial usage might have interpreted time or adult quality differently from the general law of the contract, and the former would have prevailed.

It follows, at the same time, that German courts are wrong when they purport to apply English law as an exception to German law governing the entire contract, whilst they simply ascertain the significance of certain clauses inserted in a bill of lading or an insurance policy according to English usage.<sup>65</sup>

It is a definitely distinguishable phenomenon that the parties or conflicts rules may subject a part of the contractual relationship to special applicable laws. What is to be done in interpreting foreign expressions has been well said to be really a question of fact.<sup>66</sup>

The rule of the law of the contract in itself, however, is perfectly sound.

<sup>62</sup> *Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.* (1913) 154 Fed. 13.

<sup>63</sup> *Banco de Sonora v. Bankers' Mutuality Casualty Co.* (1904) 124 Iowa 576, 100 N. W. 532.

<sup>64</sup> 2 BEALE 1261 ns. 2 and 3; STUMBERG 237 n. 18, 219 n. 73.

<sup>65</sup> See the cases *supra* n. 55 and Bay.OBLG. (Oct. 14/28, 1912) *Recht* 1913 No. 70, cited by NUSSBAUM, D. IPR. 242 who seems to approve of it in principle.

<sup>66</sup> Note, 23 Harv. L. Rev. (1910) 563.

## III. LEGALITY

In the Anglo-American conflicts literature, the doctrine of "illegality" has been singularly inflated and confused by sweeping English dicta relied upon by Beale. We have to state the correct opinion to this effect:

(a) The pertinent question is not whether the "making" or the "performance" of a contract is prohibited, but whether or not the contract is valid and enforceable by the applicable law, which is the law governing the contract as a whole. This observation needs no proof, although it seems to be widely neglected.

(b) The law of the place of contracting (if it does not govern the contract) is immaterial, and its prohibitions without any importance, as expounded earlier.<sup>67</sup>

(c) The law of the place of performance as such is of no greater significance.

(d) The rules of private law of the forum likewise should not obstruct the application of foreign law, except in extraordinary cases.

The two last contentions will be developed here and in the next chapter, respectively.

One of Dicey's rules reproduces the assertion of English judges that a contract valid under its proper law is nevertheless void if prohibited by the law of the place of performance.<sup>68</sup> Repeatedly, renowned judges have connected this alleged rule with the broader proposition that English courts should not sanction the breach of the laws of other independent states.<sup>69</sup> The principal thesis, alone contemplated here, re-

<sup>67</sup> *Supra* Chapter 29, pp. 397-400.

<sup>68</sup> DICEY 657 exception 3 (n) to Rule 159.

<sup>69</sup> Scrutton, L. J., in *Ralli Brothers v. Compañía Naviera Sota y Aznar* [1920] 2 K. B. 287, 304. The principle was called "... too well established now to require further discussion" by Lord Wright, M. R., in *International Trustee for the Protection of Bondholders Aktiengesellschaft v. Rex*. [1936] 3 All E. R. 407, 429.

curs in the municipal English law of obligations and, according to critics, belongs only to that branch of law;<sup>70</sup> in fact, it has been used in no case where a law other than English law or the law of the place of performance itself governed the contract.<sup>71</sup> The Restatement of the Law of Conflicts, however, has elaborated on this rule:

"If performance of a contract is illegal by the law of the place of performance, there is no obligation to perform so long as the illegality continues."<sup>72</sup>

The comment assumes that a local prohibition at the place of the intended fulfillment makes the contract unenforceable at any place, although this law does not govern the contract (or in Beale's theory, its validity).<sup>73</sup> Again, the rule reappears in the American Restatement of contracts law. But Williston at least indicates how uneasy he feels about this unreasonable dogma; and in a somewhat forced argument, he leads the discussion to the result that illegality under any nongoverning law does not itself kill or paralyze an obligation.<sup>74</sup>

The mistake, indeed, is of a double nature. Neither (1) has the place of performance in conflicts law the absolutely dominant role which Dicey and Beale believed; nor (2) does

<sup>70</sup> MANN, "Proper Law and Illegality in Private International Law," 18 Brit. Year Book Int. Law (1937) 97 at 107-113; MEZGER, *Nouv. Revue* 1937, 527 at 531ff.; CHESHIRE 277 n. 5 seems to agree, except for the recognition of the broader rule by the courts. See also NUSSBAUM, 51 Yale L. J. (1942) 893 at 917.

<sup>71</sup> MANN, *id.* at 111.

<sup>72</sup> Restatement § 360.

<sup>73</sup> Restatement § 360 comments b and f.

Also the Polish Int. Priv. Law, art. 10 has a similar provision: "The parties are bound by the specific legal prohibitions annulling transactions contrary to law, provided that they are in force in the states (sic) in which the debtor is domiciled and the obligation is performable by him." This obscure provision does not appear in the Czechoslovakian drafts.

<sup>74</sup> Restatement of the Law of Contracts § 458 comment b; WILLISTON, 6 Contracts 5093 § 1792; note the embarrassment of JENKS, 1 Digest of English Civil Law (ed. 3, 1938) 132 § 307.

a prohibition of the contractual performance absolutely eliminate the contractual duty in the law of obligations.

In the first place, we are carried back to the unfortunate attempts to bisect the contract so that it may be governed by different laws. The defects of this method appear patent here. If payment in gold coins, traffic in narcotics, prices exceeding a ceiling, are forbidden in any country, this does not mean that the contract is blameless while performance is reprov'd. The "great difficulty" admitted by Beale is in distinguishing what is illegality of contracting and what is illegality of performance, subject to different law; this difficulty must be immense, since the only material case is that where the contract itself is vitiated because of a prohibition of performance.

In the second place, we may contend, as a result of investigations that cannot be repeated here, that under all modern laws controlling obligations, although with some variety and occasional uncertainties, a debtor will be excused from his duty of specific performance (where this duty is recognized) by impossibility or frustration; and that his duty to pay damages for nonperformance is released, if impossibility or frustration is not included in the risk to be borne by the debtor according to the individual contract or supplementary legal rules.<sup>75</sup>

As a simple result, we have to look to the governing law, none other, to ascertain whether any obstacle laid in the path of performance, frees the debtor from his duty of specific performance, if any exists, and from damages. English courts are certainly not more ready than others to excuse the debtor in any venture. Let us contemplate the leading case principal-

<sup>75</sup> See *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.* [1918] 1 K. B. 540; [1918] 2 K. B. 467; *Romer, L. J., in Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.* [1931] 1 Ch. 274, 285; *RABEL, 1 Recht des Warenkaufs* 277, 343, 357.

ly claimed to support the thesis of Dicey and Beale and many more prudent assertions in the English and American literature.

The *Ralli* case<sup>78</sup> was decided under English law to the effect that an English firm was held not bound to pay a certain freight difference. The firm had sold jute to a Spaniard in Barcelona and, in a charter party made in London with a Spanish shipping company, agreed to a freight rate for carrying the jute from Calcutta to Barcelona. Half of the freight was to be paid by the buyer upon arrival as part of the purchase price. The Spanish law having established a maximum freight for jute, the buyer refused to pay more. Did the court really hold English law to be that, because of a Spanish prohibition, the Englishman did not owe the freight promised by him? This would cover the usual proposition, but the court would certainly not have agreed to such an untenable ruling. If a German firm had bought cotton in New York at the market price, to be paid on sound arrival in Hamburg and the German state had decreed a ceiling price for cotton, it is not very probable that any American court would hold the contractual right to the price unenforceable. What characterized the case was the fact that the freight in question, half of the contractual amount, should have been paid by the Spanish buyer to the Spanish company in Spain. Although one of the judges remarked that he did not look beyond the immediate issue, it seems evident that the English seller, if bound to pay the difference, would have lost his recourse against the buyer in a Spanish court, and that this was the reason why it seemed equitable to send the Spanish company back to the law of its own country.

Whether such equitable considerations, not quite unfamiliar to English and other courts, are sound in municipal law is of little interest here. The really decisive consideration, pointing to the distribution of risks, a consideration

<sup>78</sup> *Supra* n. 69.

grounded in a model English tradition,<sup>77</sup> was admirably followed by the Privy Council a few weeks after the *Ralli* case,<sup>78</sup> and very neatly formulated in the following American decision.<sup>79</sup>

The Tweedie Corporation of New Jersey, owner of the vessel "Catania," let the ship on hire to the McDonald Corporation of West Virginia by a written contract in New York, where both companies entertained offices. The vessel was to transport laborers on four trips from Barbados, an English colony, to Colon. New York law evidently governed. After two trips had been made, the British government prohibited any export of workers from Barbados. The performance, thus, was not impossible but illicit in Barbados. Did this prohibition of performance by the law of the place of performance excuse the hiring company from payment or even invalidate the contract? The court, somewhat perturbed by the confused authorities, nevertheless penetrated to the decisive consideration. In the spirit of the contract, as the court assumed, the McDonald Corporation had to carry the risk of the change of laws of a foreign government at the place of performance. This rigor may be approved or disapproved, but the solution is sought in the correct field of excuses for non-performance according to the governing law of New York, and the risks contemplated by the parties directed this decision.

#### IV. NONPERFORMANCE OF THE CONTRACT

##### 1. In General

Apart from the questionable theories establishing a separate law applicable to performance,<sup>80</sup> in principle the law

<sup>77</sup> See *Jacobs, Marcus & Co. v. The Crédit Lyonnais* (1884) 12 Q. B. D. 589.

<sup>78</sup> *Trinidad Shipping & Trading Co., Ltd. v. G. R. Alston and Co.* [1920] A. C. 888.

<sup>79</sup> *Tweedie Trading Co. v. James P. McDonald Co.* (1902) 114 Fed. 985; other cases are discussed by 2 BEALE 1263 § 360.2.

<sup>80</sup> Especially BEALE 1158, 1267, 1274; in France, VALÉRY 987 § 685;

governing the contract determines all its effects, including the requisites of default, excuses for nonperformance, and the effects of unexcused failure to perform.<sup>81</sup>

The English Law Reform Act of 1943, in modernizing the rules of restitution in various cases of failure of consideration, expressly presupposes that the contract is governed by English law.<sup>82</sup> The Act is understood thereby to subject the right of restitution to the law of the contract and has been criticized on this ground<sup>83</sup> because this right should be governed by the law of the place where enrichment was obtained.<sup>84</sup> But while undue enrichment in general may have to follow extracontractual lines in both substantive and conflicts law, consideration or an advance payment given on the ground of a contract is to be recovered under contractual rules. Even though, in the part concerning contracts, a code may refer to its rules relating to undue enrichment, as the German Code does, it is well settled that the relation created by the contract extends to the duty of restitution.<sup>85</sup> Hence, German courts apply the law governing the contract, and a

Judge Learned Hand in *Louis-Dreyfus et al. v. Paterson Steamships, Ltd.* (1930) 43 F. (2d) 824 recognizes that liability and excuses for nonperformance must follow the same law, but nevertheless, following the Restatement, excuses the debtor under Canadian law from the fulfillment of a Minnesota contract. Cf. NUSSBAUM, 51 Yale L. J. (1942) at 917 n. 149; BATIFFOL, 261 n. 1, 407 n. 2.

<sup>81</sup> United States: BATIFFOL 407-408 n. 2 recalls the constant practice in the cases concerning insurance and transportation.

England: *Jacobs, Marcus & Co. v. The Crédit Lyonnaise* (1884) 12 Q. B. D. 589; *Blackburn Bobbin Co. v. T. W. Allen & Sons, Ltd.*, *supra* n. 75.

Austria: OGH. (Oct. 24, 1928) 10 SZ. 609.

France: NIBOYET, 16 Recueil (1927) I 83; LEREBOURS-PIGEONNIÈRE 437 § 358.

Germany: RG. (June 26, 1912) Leipz. Z. 1912, 762; Bay. ObLG. (Oct. 15, 1930) 30 Bay. ObLGZ. 354, 368; LEWALD No. 303.

Switzerland: BG. (June 28, 1918) 44 BGE. II 280 (intention of the parties).

<sup>82</sup> The Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40.

<sup>83</sup> G. L. WILLIAMS, 7 Modern L. Rev. (1944) 66, 69.

<sup>84</sup> Williams follows GUTTERIDGE and LIPSTEIN, "Conflicts of Law in Matters of Unjustifiable Enrichment," 7 Cambr. L. J. (1939) 80.

<sup>85</sup> See BGB. §§ 323 par. 3, 325 par. 1 sent. 3; §§ 346, 347, 348 make clear



similar rule has probably been adopted in the draft of the Montevideo Treaty in 1940.<sup>86</sup>

*Illustration.* The English Act repeals the rule in the *Fibrosa* case<sup>87</sup> that a party who prepaid money under certain accidental circumstances may recover all the money paid, and the payee is not allowed to deduct his own damage and expense. Suppose that an English firm has paid a sum under an English contract to a party in a British jurisdiction in which the Reform Act has not yet been adopted, why should the payee not profit from the new and unquestionably just law governing the contract rather than depend on the place where by a casual circumstance the money was paid?<sup>88</sup>

The Restatement, it is true, applies its section concerned with the quasi-contractual obligation of restitution in an illustration, to an agreement whereby A promises to build a house for B on B's land. The promisor starts on the building but does not complete it. When he sues B to recover the amount by which A's labor and materials have benefited B, the law of the place where the land is, allegedly applies. But in the illustration, fortunately, it is this law that allows the

that restitution on the ground of rescission is not identical with recovery of undue enrichment.

<sup>86</sup> Germany: Under the common law: RG. (June 18, 1887) 4 Bolze No. 26; Bay. ObLG. (Nov. 16, 1882) 38 Seuff. Arch. 260, still regarded as leading cases by NUSSEBAUM, D. IPR. 295 n. 2. Under the actual practice, the courts apply the law of the place of performance of each party with respect to his obligation. If a buyer has paid the price in advance, he may recover after rescission, under the law of the place where he had to pay under the contract. For the cases see LEWALD 252 No. 311 *sub* (2). RAAPE, D. IPR. 296ff. adds support by examining the practical results.

Montevideo Treaty, draft of 1940, art. 43 says that the obligations arising without contract are governed by the law of the place where the act is done from which they derive "and, in the proper case (*en su caso*) by the law governing the legal relations to which they correspond." This obscure text seems best construed as above.

<sup>87</sup> *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A. C. 32.

<sup>88</sup> Exactly to the same effect, FALCONBRIDGE, "Frustrated Contracts: The Need for Law Reform," 23 Can. Bar Rev. (1945) 43 at 60 with reference to Ontario. And see, more recently, MORRIS, "The Choice of Law in Statutes," 62 Law Q. Rev. (1946) 170, 181; FALCONBRIDGE, *Conflict of Laws* (1947) 365.

recovery.<sup>89</sup> Otherwise, it would have been difficult to defend the nonapplication of the law decisive for all of the contract.

## 2. Sanctions of Nonperformance

The unity of the contract must naturally be preserved also with respect to the several sanctions of nonperformance.<sup>90</sup>

*Rescission.* Whether a party is entitled to cancel a contract and what restitution is due in this case by either party, is determined by the law of the contract.<sup>91</sup> Beale, who would have preferred the law of the place of performance, explains the cases by the theory of the courts that the right of rescission flows from a sort of implied contract.<sup>92</sup> But this, indeed, is the correct theory, inasmuch as it acknowledges a right inherent in the contract.

*Damages.* The old conception that damages exclusively pertain to the procedural law of the forum, has maintained as little force with respect to breach of contract as with respect to tort.<sup>93</sup> The right to recover and the measure of

<sup>89</sup> Restatement § 452 illustration 3.

<sup>90</sup> E.g., German Reichsgericht (Jan. 10, 1911) Warn. Rspr. 1911, No. 111: the right to exercise a lien is governed by the law of the contract rather than that of the place where the right is exercised.

<sup>91</sup> United States: *Sokoloff v. Nat'l City Bank of New York* (1924) 239 N. Y. 158, 145 N. E. 917, *aff'd* (1928) 250 N. Y. 69, 164 N. E. 745; *American Union Bank v. Swiss Bank Corp.* (1930) 40 F. (2d) 446; (both cases recognized by 2 BEALE 1275, as authorities contrary to his own theory). For insurance, see *New York Life Ins. Co. v. Cravens* (1900) 178 U. S. 389; *Mutual Life Ins. Co. of New York v. Johnson, Administrator* (1934) 293 U. S. 335; and for other types of contracts, *Pratt v. Dittmer* (1921) 51 Cal. App. 512, 197 Pac. 365; *James N. True v. Northern Pacific R. Co.* (1914) 126 Minn. 72, 147 N. W. 948.

As an example of application of the foreign law stipulated by the parties, see *Rubin v. Gallagher* (1940) 294 Mich. 124, 292 N. W. 584 (partial recovery of paid installments in a title-retaining sale).

England: *Benaïm and Co. v. Debono* [1924] A. C. 514.

France: Cass. (civ.) (May 12, 1930) S.1931.1.129, Clunet 1931, 164ff.; BATIFFOL 405 § 490.

Germany: RG. (Oct. 30, 1926) 39 Z.int.R. 276; Reichsarbeitsgericht (Dec. 21, 1932) IPRspr. 1933, 23.

<sup>92</sup> 2 BEALE 1275 § 373.1.

<sup>93</sup> The procedural theory was maintained in Massachusetts as a hangover from

damages in a violated contract are determined by the law governing the contract.<sup>84</sup> This law also extends to the question whether damages may be obtained in addition to rescission.<sup>85</sup> Occasionally, as in tort, it happens in this country that a court wrongly denies the right to damages because of a different construction in the domestic law. The Michigan Supreme Court in *Mount Ida School v. Rood*,<sup>86</sup> refused to enforce the right of a school to a contractual fee under an agreement recognized to be governed by Massachusetts law, because the plaintiff asked for the full amount allowable in Massachusetts, instead of deducting at once in his own complaint the costs he would have incurred in case of performance, as prescribed in Michigan. The court, to avoid the "illogical and unjust result" of Massachusetts law, resorted to the public policy of the forum and has been justly criticized therefor.<sup>87</sup>

the past: *Grimshaw v. Bender and Dana* (1809) 6 Mass. 157; *Ayer v. Tilden* (1860) 15 Gray (81 Mass.) 178; *Ives v. The Farmers' Bank* (1861) 2 Allen (84 Mass.) 236.

<sup>84</sup> United States: Restatement § 413 (law of the place of performance); *Walker v. Lovitt* (1911) 250 Ill. 543, 95 N. E. 631; *Amos v. Kelley Co.* (1927) 240 Mich. 257, 215 N. W. 397; *Riddle v. Hudson* (1917) 68 Okla. 173, 172 Pac. 921, 926; *Wynne v. McCarthy* (C. C. A. 10th 1938) 97 F. (2d) 964; *Stentor Electric Mfg. Co., Inc. v. Klaxon Co.* (1940) 115 F. (2d) 268, 275; *Smyth Sales Inc. v. Petroleum Heat & Power Co.* (1942) 128 F. (2d) 697, 702 (the last two dicta by Goodrich, J.).

Canada: Supreme Court of Canada, *Livesley v. Horst & Co.* [1924] S. C. R. 605, [1925] 1 D. L. R. 159.

Ontario: *Schrader, Mitchell & Weir v. Robson Leather Co.* [1912] 3 D. L. R. 838 (*lex loci contractus*).

Quebec: See 3 Johnson 394 n. 2.

Germany: RG. (March 27, 1903) JW. 1903, 184; (Jan. 21, 1908) Leipz. Z. 1908, 308, and many subsequent cases; RG. (March 24, 1933) IPRspr. 1933 No. 14.

Italy: Cass. (June 20, 1938) Sett. Cass. 1938, 131, 7 Giur. Comp. DIP. 324 No. 173.

<sup>85</sup> Cass. (civ.) (May 12, 1930) *supra* n. 91.

<sup>86</sup> *Walton School of Commerce v. Stroud* (1929) 248 Mich. 85, 226 N. W. 883, Wiest, J., dissenting; *Mount Ida School v. Rood* (1931) 253 Mich. 482, 235 N. W. 227, 74 A. L. R. 1325.

<sup>87</sup> Notes, 14 Minn. L. Rev. (1930) 665, 670; 78 U. of Pa. L. Rev. (1930) 640; 80 U. of Pa. L. Rev. (1931) 126; AILES, "Substance and Procedure in the Conflict of Laws," 39 Mich. L. Rev. (1941) 392, 411, 417. But the federal Circuit Court of Appeals has regretfully accepted the rule that the law of the

*Penalties.* The same law may be expected to apply to the various types of penalties stipulated in contracts. This has been constantly recognized by the German courts resorting to the law governing an obligation in order to determine the validity of a penalty promised in case of nonperformance or delay,<sup>98</sup> the concurrence of the right of penalty with the right of damages,<sup>99</sup> and the question of waiver.<sup>100</sup>

The same is probably true in this country,<sup>101</sup> with one restriction. The purpose in agreeing on a penalty may be either to fix a lump amount of damages or to punish the defaulting debtor irrespective of damage, both valuable stipulations when the evidence of actual damage is difficult to obtain, the latter method also being useful to secure promises lacking any pecuniary estimation. Nevertheless, some American courts persist in believing that all liquidated damages are punishments and that they are unenforceable despite the fact that their purpose is not "to punish an offense against the public justice of the state" but to grant a civil right to a private person.<sup>102</sup> These courts are said to be supposed to refuse enforcement to a promise that they regard as a penalty, although it is valid under the law considered by these courts themselves as governing.<sup>103</sup>

An analogous public policy was once announced in a German decision which reduced an agreed sum by application of

forum applies as settled by these cases, *Transit Bus Sales v. Kalamazoo Coaches Inc.* (1944) 145 F. (2d) 804, 807.

<sup>98</sup> RG. (March 15, 1892) 2 Z.int.R. 477; RG. (Dec. 1, 1911) 22 Z.int.R. 311; and other cases.

<sup>99</sup> RG. (Jan. 5, 1887) 19 RGZ. 33 (penalty clause under English law).

<sup>100</sup> ROHG. (Feb. 1, 1875) 16 ROHGE. 14; OLG. Dresden (July 10, 1891) 2 Sächsisches Archiv für bürgerliches Recht 650, cited by LEWALD No. 375a.

<sup>101</sup> Restatement § 422 (1).

<sup>102</sup> Words of Mr. Justice Gray in defining statutory penalties with respect to judgments not falling under the Full Faith and Credit Clause, *Huntington v. Attrill* (1892) 146 U. S. 657, 673-4.

<sup>103</sup> Restatement § 422 (2); BEALE 1340 § 422.1 cites only two cases of 1889 and 1893, respectively.

the domestic provision contained in the Civil Code that the judge should mitigate an exaggerated penalty according to his discretion. It has been correctly objected that such reduction cannot be essential, since the German Commercial Code allows no such judicial mitigation.<sup>104</sup>

*Moratory interest allowed as damages.* Finally there is no reason why, on principle, damages for delay in a money payment fixed by law at some percentage of the principal sum, should not be governed by the law of the contract.<sup>105</sup> The contrary decisions of the French Court of Cassation are obsolete.<sup>106</sup> But in the United States, it is said that the law of the place of performance applies.<sup>107</sup> Since the cases alleged for support mostly refer to negotiable instruments, which, in fact, are in a special category, we shall reserve the question for a later opportunity.

### 3. Burden of Proof

We may repeat the statement made in the discussion of torts that, in the prevailing theory, except in English courts, burden of proof is controlled by the law governing the substantive rights.<sup>108</sup>

<sup>104</sup> Germany: BGB. § 343; OLG. Hamburg (Dec. 23, 1902) 59 Seuff. Arch. 63, 14 Z.int.R. 79. *Contra*: see 2 FRANKENSTEIN 232; LEWALD 257.

Similarly, Switzerland: BG. (Feb. 25, 1915) 41 BGE. II 138.

On the other hand, in Brazil, 2 PONTES DE MIRANDA 210 states that a Brazilian court may exercise a German-created right of mitigating a penalty, art. 927 of the Brazilian C. C. not being based on public policy.

<sup>105</sup> Germany: RG. (Feb. 20, 1880) 1 RGZ. 59, 61; (Jan. 8, 1930) Hans. RGZ. 1930 B 211, 214.

<sup>106</sup> BATIFFOL 413 § 503 has only alleged correct decisions of lower courts, but the decision Cass. (civ.) (May 15, 1935) S.1935.1.244 clearly recognizes the law of the place of contracting as that intended by the parties, *cf.* ESMEIN, 10 Z.ausl.PR. (1936) 884.

<sup>107</sup> 2 BEALE 1335 § 418.2; STUMBERG 240 n. 28.

<sup>108</sup> LORENZEN, 32 Yale L. J. (1923) at 332 n. 74; *supra* pp. 283-286.

Germany: RG. (April 17, 1882) 6 RGZ. 412; (Oct. 29, 1925) 79 Seuff. Arch. 353 No. 215; (May 19, 1928) 82 *id.* 289 No. 164.

The application of the *lex fori* in England has been reaffirmed by an Admiralty Court judge and the Court of Appeals in *The Roberta* [1937] 58 Ll. L. Rep. 159, 177; [1938] 60 *id.* 84, 85.

## V. CHANGE OF LAW

The prevailing view seems to be that in any law suit the law governing a contract applies in the form in which it is in force at the time of the final decision.<sup>109</sup> Rules of law repealed after the making of the contract are inapplicable and replaced by the current rules. This opinion is in conformity with the view set forth in this work that all references to a foreign law as applicable to a certain question are directed to the whole law of the foreign state, to the body of its system susceptible of alterations, and not to a few selected rules.

Occasionally, in this country, a contrary idea has been advanced, as if the applicable law were that existing at the time when the contract was made. The New York Court of Appeals thought it necessary to excuse a deviation from this alleged principle, when it applied the Joint Resolution of Congress abrogating the effect of gold clauses to bonds issued previously in New York, the new law being constitutional and representing the public policy of the forum.<sup>110</sup> Evidently, such opinions are stimulated by the doctrine prohibiting retroactive laws from impairing vested rights. But our subject should not be confused with constitutional problems.

At any rate, the New York Court argued on the presumption of an intention of the parties to submit to the laws of

<sup>109</sup> England: *In re Chesterman's Trusts* [1923] 2 Ch. 466, 478.

France: BATIFFOL, *Revue Crit.* 1935, 615 at 618; HAMEL, *Nouv. Revue* 1937, 499 at 509; BATIFFOL 68 § 74.

Germany: RG. (Jan. 27, 1927) and (March 22, 1927) IPRspr. 1926/27 No. 42 with more documentation; RG. (May 26, 1936) JW. 1936, 2058.

<sup>110</sup> *Compañía de Inversiones Internacionales v. Industrial Mortgage Bank of Finland* (1935) 269 N. Y. 22, 26, 198 N. E. 617.

It is entirely distinguishable that under the Georgia Code (1895) § 2880, (1933) § 57-106 "every contract bears interest according to the law of the place of the contract at the time of the contract," and therefore a defendant's plea that the contract was usurious according to a certain Alabama law, was dismissed, because the defendant had not proved the existence of that law at the time of the contract; see *Thomas v. Clarkson* (1906) 125 Ga. 72, 54 S. E. 77; and for subsequent cases, *Jones v. Lawman* (1937) 56 Ga. App. 764, 770, 194 S. E. 416, 420. This regards a cause of initial defect in the contract.

New York. There are cases, in fact, in which the parties may well be supposed to have tacitly agreed on a reference to a law merely as it was at the time. However, as seen earlier, it is controversial whether the parties are allowed to do so.<sup>111</sup> As a rule, no such temporary limit should be understood to inhere in either an agreement or an intention of the parties; too many difficulties would be raised in ascertaining a substituted law. In fact, the Joint Resolution of 1933 has been applied in a great number of decisions in various countries as a subsequently enacted part of New York law governing bond debentures.<sup>112</sup>

Similarly, the main part of the German Law of Revalorization of 1925, prescribing that certain debts expressed in "Mark" currency should be due in the amount of a percentage in new "Reichsmark," was regarded without hesitation as an alteration of the German law.

Only the peculiar provision of this law was much contested whereby a debtor having redeemed a mortgage with heavily depreciated money was bound to add some supplementary payment. While some courts of other countries repudiated this retroactive law under the point of view of public policy,<sup>113</sup> a Dutch court argued that a Dutchman, having bought a house in Germany, paid the mortgage effectively under the law then existing, and resold the house before the new law went into force, had no connection with Germany and could not be affected by German legislation.<sup>114</sup> The court, thus, denied the continued effect of the governing law rather than its retroactivity, a view of great force.

Finally, obligations entered into under the Czarist Russian legislation before the 7th of November, 1917, were prohibited by Soviet legislation from being brought before the

<sup>111</sup> *Supra* Chapter 28, p. 393.

<sup>112</sup> See the surveys in *Z.ausl.PR.* Vols. 9-11.

<sup>113</sup> See the cases *infra* Chapter 33, p. 567 n. 46.

<sup>114</sup> *Rb. Rotterdam* (June 13, 1930) *W.* 12266.

courts.<sup>115</sup> In agreement with the prevailing opinion, a Swiss court held that as a consequence Soviet law replacing the former law made the obligations in question unenforceable also in Switzerland.<sup>116</sup> While the objection of public policy to the legislative impairment in this case was expressly denied, it might be granted under circumstances where the contract has sufficiently close connection with the forum, as when the debtor resides in the forum at the time of the decree.<sup>117</sup> But even so, obligations expressed in Czarist roubles are without object.<sup>118</sup> Cases seem to be rare in which it may be reasonably argued that an old Russian contract survives under some substituted law.<sup>119</sup>

In conclusion, we may state the principle that changes in the applicable law must be observed, except where a contrary agreement of the parties is ascertainable and permitted by the law of the forum.

<sup>115</sup> Art. 2 of the Introductory Decree of Oct. 31, 1922, to the Civil Code.

<sup>116</sup> App. Zürich (Dec. 19, 1928) 3 Z. f. Ostrecht (1929) 1403 with approving note by FREUND.

<sup>117</sup> In the case of Nazi-German expropriations, *Weber v. Johnson* (1939) 15 N. Y. Supp. (2d) 770; *Anninger v. Hohenberg* (1939) 172 Misc. 1046, 18 N. Y. Supp. (2d) 499.

<sup>118</sup> *Lehman, J.*, in *Dougherty v. Equitable Life Assurance Society* (1934) 266 N. Y. 71, 105, 193 N. E. 897, 910.

<sup>119</sup> M. WOLFF, *Priv. Int. Law* 431 § 406 makes the interesting suggestion that a revolutionary overthrow of the existing law and its replacement by something new is not included in a choice of law by the parties. In my opinion, this is a question of interpretation, as also with respect to less exorbitant changes of law, such as the Joint Resolution on gold clauses. The difficulties, however, of a new choice of law made necessary by the suggestion, may be great.



## CHAPTER 33

# Public Policy<sup>1</sup>

### I. THE LAW OF THE FORUM

#### A. THE PRESENT SITUATION

THE manifold objections raised against a free choice of law by the parties have proved without foundation except as justified by resort to the public policy of the forum.<sup>2</sup> Equally, it has been indicated, despite various assertions, that neither the law of the place of contracting nor that of the place of performance has a paramount role in regulating the legality of transactions, but the forum may have a word to say.<sup>3</sup> At the same time, it has appeared that

<sup>1</sup> For the United States, see BEACH, "Uniform Interstate Enforcement of Vested Rights," 27 Yale L. J. (1918) 656; GOODRICH, "Public Policy in the Law of Conflicts," 36 W. Va. L. Q. (1930) 156; *id.*, "Foreign Facts and Local Fancies," 25 Va. L. Rev. (1938) 26; 3 BEALE § 612.1; STUMBERG, "Conflict of Laws—Validity of Contracts—Texas Cases," 10 Tex. L. Rev. (1932) 163, 182; also STUMBERG 178-179; HUSSERL, "Public Policy and Ordre Public," 25 Va. L. Rev. (1938) 37. Note, "The Public Policy Concept in the Conflict of Laws," 33 Col. L. Rev. (1933) 508.

In the continental literature, every writer on conflicts law has discussed the problem. Basic: KAHN, "Die Lehre vom Ordre Public (Prohibitivgesetze)," first in 39 Jherings Jahrb. (1898) 1-112, 1 Abh. 161-254. Bibliographies by NIBOYET, 10 Répert. 92, 1 STREIT-VALLINDAS 315-317. MARTI, "Der Vorbehalt des eigenen Rechtes im internationalen Privatrecht der Schweiz," (Abhandlungen zum Schweizer. Recht, ed. Gmür-Guhl, No. 176, 1940). More recent articles by LOUIS-LUCAS, "Remarques sur l'ordre public," Revue 1933, 393, and VALÉRY, "Examen critique des remarques sur l'ordre public de M. Pierre Louis-Lucas," 61 Revue Dr. Int. (Bruxelles 1934) 194, continue the French dispute on the elements of which *ordre public* consists. Are there one (NIBOYET, Manuel 547 § 443); or two, namely, (a) in the prevailing distinction *ordre public interne* and *international* (WEISS, 3 Traité 94) or (b) rather relative and absolute (LAINÉ, Annuaire 1908, 47); or three (LOUIS-LUCAS); or four (VALÉRY) elements?

For a complete survey on the German practice until 1932, see MELCHIOR 324ff.

<sup>2</sup> *Supra* pp. 427-429.

<sup>3</sup> *Supra* p. 535.

resort to the public policy of the forum is a delicate and very rarely justifiable measure.

Under these circumstances, some observations on the influence of public policy are indispensable in the present connection, although we have not attempted any such generalizations in the field of family law. In fact, while the common habit of treating public policy in conflicts law in comprehensive terms is quite unsound, the controversy on this much debated subject has a special meaning for obligations. The need for security of transactions involving family or inheritance may well mean that the state of domicil or nationality should be privileged to regulate the individual's marriage, adoption or will. The social policy of such state and its conception of family interests have some claim to be preferred over the legal systems of places where parties merely happen to meet. Where personal law and contracts law clash, however, as in the question of the capacity of married women to undertake obligations by contract, the solution is controversial; American courts are divided in recognizing the policy of the domicil or that of the state of contracting as predominant. We have supported the English intermediary proposition that for business contracts the law governing the contract should apply to the exclusion of domiciliary policy.<sup>4</sup> Special considerations apply also with respect to transfer of possession or title; any influence of contracts on personalty or realty may be excepted from this chapter.

*Uncertainty.* Interstate and international contracts not concerned with family or inheritance rights and not directly affecting possession or title, are secure only if they are removed as completely as possible from the play of local policies and predilections alien to the purpose of the contract. Nevertheless, time and again, though but sporadically, courts have

<sup>4</sup> See Vol. 1 p. 195.

measured contracts with the yardstick of their local conceptions, whether because one party was a resident of the forum—a regrettable approach sometimes shared by New York judges; or because the agreement was completed by a “final” act within the forum—a view sanctioned by the Restatement’s exaggerated formalism; or on the ground of the parties’ national connection—as frequently but unjustly claimed by French and Latin-American jurisdictions. In a number of cases, contracts have been subjected to the “public interest” of the forum without any connection with its territory.

The various general formulas used in enactments referring to the exception of public policy,<sup>5</sup> though sometimes worthy of attention, have been of no practical help. The *Código Bustamante* establishes special rules for obligations but recognizes “international public order” on an extremely vast scale.<sup>6</sup> A recent law of Guatemala characteristically deprives foreign law of all effect if it is “contrary to the national sovereignty, the laws and the public order.”<sup>7</sup>

By common agreement, not all municipal legal rules are a potential obstacle to the application of foreign law, not even by any means all those considered “imperative” in the domestic sphere. Only a “strong” public policy in the words of the Restatement (§ 612), or an “international public order,” as the internationally relevant part of the national public policy is commonly called in France, prevent enforcement of the law referred to by a conflicts rule. Just what rules pertain to this class remains in intentional obscurity. The fantastic use of the doctrine made in certain judicial decisions has been shown in lists of horrible cases collected long ago.<sup>8</sup>

<sup>5</sup> See MAKAROV 419 (Systemat. Register); NIBOYET, 10 Répert. 92ff.

<sup>6</sup> Arts. 175-182, 246.

<sup>7</sup> Law on Foreigners of 1936, art. 23.

<sup>8</sup> See, for instance, KAHN, 1 Abhandl. 169, 214-217, 247 n. 132, 248-251;

1 FRANKENSTEIN 186.

Over and over again, writers have emphasized that the cases cannot be forced into any system, which is quite true in the present state of things. Any scholar in any country, devoting himself to a study of habits of court in this field, must feel exactly as did the observer in this country who declared that he retired baffled from an examination of the American cases:

"The conclusion must be, then, that a clearly developed and defined concept of public policy cannot be found in the cases. . . . We do know enough to say with considerable confidence that an investigation to determine when the courts will apply the doctrine of public policy to deny the recognition of a foreign right would result in the conclusion, 'you never can tell.'"<sup>9</sup>

You never can tell! The worst feature of the traditional latent conflict between private international law and municipal law is precisely this resultant uncertainty. For the sake of relatively few doubtful cases, the sword of Damocles hangs over each and every contract. The courts usurp a discretionary power when to apply conflicts rules and when to sacrifice them, a freedom exercised at the cost of the parties' freedom to contract outside the forum. The antiquated loose talk of comity between states, not having any contractual rights to be enforced, perpetuates a feeling that conflicts rules are inferior to internal rules.<sup>10</sup> But, for a long time, the best informed scholars and judges have agreed that an unqualified reservation in favor of the law of the forum is a menace to extrastate business activity. The great majority of writers, it is true, have been satisfied with the disconsolate and resigned statement that there is no rule or method of forecasting. Perhaps, most of them share in the conviction of the courts that public

<sup>9</sup> NUTTING, "Suggested Limitations of the Public Policy Doctrine," 19 Minn. L. Rev. (1935) 196, 200.

<sup>10</sup> See for illustration the summary in 15 C. J. S. 836, 837 and the cases in ns. 27-29 *ibid.*

policy ought to remain as an unlimited safety valve, although they want it used only as an exception.

*Full Faith and Credit Clause.* In the United States, the application of public policy in conflicts law must be distinguished from "matters of local concern" exempted from the constitutional duty of states to enforce the laws and acts of sister states. Although the Full Faith and Credit Clause contains potential force to develop federal conflicts rules, only few rudimentary elements for such development have appeared. All theories for delimiting the domain of the Full Faith and Credit Clause on the basis of the cases have failed. As was stated in 1935, "it seems reasonably clear . . . that the Supreme Court has not constituted itself an arbiter in all conflicts cases and that there is a field, albeit of indeterminate boundaries, where the public policy of the state may hold sway."<sup>11</sup>

At the beginning of 1945, a long series of elaborate decisions had led the Supreme Court to a point where one of the Justices declared:

"I cannot say with any assurance where the line is drawn today between what the Supreme Court will decide as constitutional law and what it will leave to the states as common law."<sup>12</sup>

It is certainly true that a slight connection of a case with the forum not only makes application of the domestic law ludicrous but ordinarily also calls for the sanction of the Full Faith and Credit Clause.<sup>13</sup> But the inverse would not be true. Although remaining in the sphere of constitutional independence, a court is by no means entitled to impress local views on foreign transactions. The conflicts rule binds the court.

<sup>11</sup> NUTTING, *supra* n. 9, at 205.

<sup>12</sup> Mr. Justice JACKSON, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. (1945) 1, 13.

<sup>13</sup> STUMBERG 253, Note *in fine*.

Confusion is sometimes encountered even in recent cases. A federal court sitting in Missouri considered a clause of restraint of trade stipulated in the employment contract of a branch manager.<sup>14</sup> The clause was valid according to Missouri law and void according to Michigan law. The employee had never been in Michigan; the contract was negotiated in St. Louis and performed first in Illinois and thereafter in St. Louis. The one thing done in Michigan was that the company, resident there, assented to the contract. The court explains that authorities are divided between *lex loci contractus* and *lex loci solutionis*, but that the true answer, independent of both, is given by the principle laid down by the Supreme Court of the United States that a state has to enforce a sister state's law under the Full Faith and Credit Clause, except where its own public policy prevails. In the case at bar, Missouri had a major interest, while Michigan had practically none. This is true, but if the contract had had sufficient connection with Michigan to render the application of the Michigan law natural, it would be very improper for a Missouri court to declare the clause valid despite the Michigan prohibition, whatever its so-called "interest." Public policy validating foreign void agreements is possible but rarely asserted, and for good reasons. Thus, the conflicts question should have been plain. The decision was correct for the simple reason that the entire contract was centered in Missouri.

*Due Process Clause.* From the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, it has been occasionally deduced that a state may not resort to its own public policy to invalidate a contract made and consummated in another state. It was thus decided in 1934 that clauses of an insurance contract entered into in Tennessee in

<sup>14</sup> Holland Furnace Co. v. Connelley (1942) 48 F. Supp. 543.

the presence of the parties and their employees, valid according to a decision of the Tennessee Supreme Court, could not be challenged in Mississippi at the domicile of the insured.<sup>15</sup> The Supreme Court expressly recognizes that a state cannot enlarge the obligations of the parties to accord with every statutory policy.<sup>16</sup> While similar reasonings may normally be based also on the Full Faith and Credit Clause, the Due Process Clause can be used to cover the observance of the law of foreign countries.

*American repugnance to the use of the exception.* Fortunately, American writers<sup>17</sup> and courts are more reluctant than all others to avail themselves of this exception. The issue has been clarified by frank emphasis on the independent reasons of policy supporting conflicts law.

"There surely is a policy both of good morals and commercial stability in giving legal effect to agreement lawfully made. To deny enforcement to the foreign made contract makes the state of the forum a shelter for those who refuse to perform their legal obligations. Unlike the cases where a court refuses relief to persons in *pari delicto*, such a rule penalizes the obligor who, by hypothesis, was doing nothing forbidden by law when and where his contract was made. Both morality and expediency are opposed to such a conclusion. Fortunately we may say with high confidence that this attitude is passing . . . we become not only less suspicious towards other people's food and customs, but of their legal institutions as well."<sup>18</sup>

English courts are more impressed by regard for international comity, requiring the recognition of the legislation of

<sup>15</sup> Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143.

<sup>16</sup> *Id.* at 149; Home Insurance Co. v. Dick (1930) 281 U. S. 397, 407-8.

<sup>17</sup> 3 BEALE 1651 agrees with the protest: the resort to the exception "should be extremely limited. This is especially true between the states of the United States."

<sup>18</sup> GOODRICH, 36 W. Va. L. Q., *supra* n. 1, at 171.

other independent states,<sup>19</sup> but the result is similar, inasmuch as public policy serves only exceptionally to bar the application of foreign law. The courts are anxious to limit the public policy doctrine to "clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."<sup>20</sup> It is true, however, that the English extension of procedural, penal and jurisdictional prerogatives reduces such liberality in many instances,<sup>21</sup> although this is more notable in the field of torts.

*Recent European reaction.* This highly desirable progress in the general American attitude must be anxiously preserved, in face of a strange literary reaction coming from Europe's darkest currents of nationalism. Writers have consciously yielded to a resurgent spirit that militates against the "liberal" and "cosmopolitan" tendencies of the nineteenth century. The usual approach has been reversed. Public policy, far from furnishing a rare exception to conflicts law, is now elevated to the foremost principle, and application of foreign law subordinated, as a mercy granted when convenient to the domestic system. No longer a kind of nuisance, resort to the law of the forum is deemed an organic element of conflicts law. The Italian sources of this new theory seem to flow from fascism, on the one hand, and from the theories of "reception," on the other. That foreign law must not only be referred to by the conflicts rule but also "received" into the domestic law, has become a dangerous proposition. It will suffice to quote in translation a few passages found in texts of writers who would not have been expected to foster such views:

<sup>19</sup> Scrutton, L. J., in *Aksionairnoye Obschestvo. A. M. Luther v. Sagor & Co.* [1921] 3 K. B. 532, 558.

<sup>20</sup> Lord Atkin in *Fender v. St. John-Mildmay* [1938] A. C. 1, 12

<sup>21</sup> M. WOLFF, *Priv. Int. Law* 178 § 170.



The principle followed thus far as basis of the internationalistic conception, ought to be reversed by applying the logically opposed nationalistic conception. This application purports to consider the problem of the clause of reservation or of public order, as a *problem of interpretation*. The foreign law may be enforced as special internal law in the cases of international nature, provided that it can be assumed that *the legislator has intended its enforcement as such*. . . . Where such application cannot be founded upon the most probable intention of the legislator, automatically the internal common law re-enters into force, that is, the territorial law.<sup>22</sup>

In the first place, the assertion seems legitimate that . . . the limitation by public order constitutes in a certain sense a part of every rule of private international law. In every conflicts rule a clause must be considered implied to the effect that . . . foreign rules are referred to only to the extent that the insertion of such rules into the internal legal order does not disturb the harmony of its system.<sup>23</sup>

Recently, such a voice has been heard in this country. Nussbaum encourages the courts to a more uninhibited use of the public policy doctrine on the ground of local conceptions of the conflict of laws. In his opinion, the tendencies against public policy were caused by "liberal" and international-minded illusions and still more by "dogmatic" preferences.<sup>24</sup> To quote:

" . . . in the question of 'public policy,' obnoxious though this concept may appear from the cosmopolitan point of view, the latter would practically lead to the weakening of a country's position vis-à-vis of foreign powers."<sup>25</sup>

"English and American courts . . . are most hesitant to

<sup>22</sup> PACCHIONI, *Elementi* 207-208.

<sup>23</sup> AGO, *Teoria* 319-320.

<sup>24</sup> NUSSBAUM, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," 42 Col. L. Rev. (1942) 189 at 198 and in his other articles cited *id.* 196.

<sup>25</sup> NUSSBAUM, *op. cit.* preceding note at 200.

resort, in terms, to public policy. . . . In a few cases courts have tried to rationalize their reserved attitude, but the reasons advanced are unconvincing. The explanation must probably be sought in the liberal tradition of the common-law courts. . . . Liberalism postulates international-mindedness favorable to the recognition of foreign law. . . .

"Antipathy to public policy is not confined to common law courts. It is even more intense in the majority of continental writers. To them, it is the 'Cerberus' lying at the threshold of International Private Law. . . . In fact it is not so much liberalism of the English brand as internationalist dogmatism that is behind the prevailing attitude of Continental learning. . . . The most important part of the American problem of public policy bears upon interstate relations. With respect to this area, American writers have taken a particularly strong stand against the use of public policy. . . . Nevertheless, the several states, having been left in the possession of an almost unlimited legislative power in the private law field—a power actually exercised on the largest scale—they can hardly dispense with the protection provided by the public-policy rule against the infusion of disturbing elements which may result from contrary legislative policies of sister states."<sup>26</sup>

Is it necessary to say that even the most rigid positivism can afford to give conflicts rules established by the state itself the same value as other state law? Or to point out that perhaps liberalism but certainly not preconception enters into the cause when arbitrariness is utterly disliked?

#### B. THE PROBLEM

The familiar formulas, declaring the priority of "public policy, laws of the state, and morality" or reservations of "imperative laws and good morals" are too vague and comprehensive. Others, more modestly referring to public order and good morals, are exploited far beyond their literal mean-

<sup>26</sup> NUSSBAUM, *Principles* 113, 115, 123.

ing. If you establish a conflicts rule on the premise that a certain situation of living should be governed by a certain foreign law and at the same time declare that this same situation under unspecified conditions may require resort to the law of the forum, you have indeed deprived the conflicts rule of its legal character and reverted to the fabulous "*comitas gentium*," which negated legal rules of international behavior and left every decision to uncontrollable courtesy. Perfectly well aware of this line of thought, courts like to repeat the old slogan of comity every time they consider a possible breach of their otherwise recognized conflicts rules.

In the field of contracts, it would seem that the difficulties caused by the multiformity of our legal systems may be considerably alleviated, if territorial claims of state legislation are definitely confined to those branches of law that have to serve public interests.<sup>27</sup>

### I. Policy of Public, Especially Administrative, Law

The prudent Roman jurists had a trichotomy of *leges perfectae*, *leges minus quam perfectae*, and *leges imperfectae*, according to whether contracts violating a legal prohibition were void, punishable only, or not affected by any sanction. Modern legislators, with their multitude of commands and prohibitions, rather take for granted the rule that offending agreements are void, and leave to the courts the laborious task of construing this or that prohibition so as not to affect validity. Despite such attempts at restrictive interpretation, innumerable criminal, fiscal, and especially administrative provisions do entail, often by natural consequence, sometimes

<sup>27</sup> The Continental literature discussing "territorial" law or *lois de sûreté et police* sometimes approaches the distinction used here. Particularly NIBOYER 550 § 443; 10 Répert. 95 No. 7, distinguishes public order from imperative laws, and NEUMEYER, 4 Int. Verwaltungs R. 251, 431 separates public law from public policy. However, nowhere to my knowledge has the view advocated in this chapter been supported.

wantonly, the nullity or at least unenforceability of contravening agreements. A purpose of general state administration or of the welfare of the population in general, is protected by interfering with private law. Sales of poison, arms, or liquor, employment of children, creating of monopolies, stipulations of gold clauses, trading with the enemy, are ordinarily void to the extent that the transactions are forbidden, not to mention contracts to overthrow the government, or to forge money.

On the other hand, it is still true, after every imaginable controversy in the last decades, that in establishing the rules of behavior characteristic of private law, the state fulfills its own interest only in so far as it is interested in fair justice as the basis of mental and physical happiness. The particular rules serve in the first place the interests of individuals and organizations rather than those of state or society.

If a state, not contented with the broad inroads of modern public law into the former spheres of private law, considers every substantive rule as mingled with consideration of community interests, it is logical to deny the existence of private law as the National-Socialist writers have done; they detested even the name of "Civil Code."

If a continuing fundamental difference between private and public law is conceded, the position of conflicts law in the meaning of private international law appears distinctly attached to private law alone, while administrative and fiscal rules have their own scope to be delimited for each according to its specific purpose.

It will perhaps be objected that the distinction between private and public law, not familiar to the older common law, has been blurred in the civil law countries by wide spheres of mixed policies. However, the interference of public interest, great as it is, proceeds in discernible directions.

To take the most important example, modern labor law is composed of two parts.<sup>28</sup> The one, pertaining to public law, which regulates the relations of employers and employees to the state and other public corporations, has been extended to include legislation on working hours, women and child labor, social insurance, organization of unions, or compulsory representative bodies, labor boards, and the procedure for settlement of labor disputes. The other part consists of the rules relating to individual contracts of employment as well as to collective bargaining. That a tariff convention is a contract of private law has been deduced in German law from the three points of view that the parties are private persons, the form is that of a private contract and the purpose is the regulation of private relations.<sup>29</sup>

In certain situations where the border line between private and public relations may seem doubtful, the difficulty of deciding on the exception of public policy exists under any theory. It is nevertheless certain from the objective point of view of critical jurisprudence that, for instance, a statutory provision prohibiting premature termination of an employment contract pertains to private law, when it is a perpetual regulation of the time requisite to give notice, since, then, it primarily protects the private interests of the workers and the enterprises, while it belongs to public law when it is an emergency measure in a temporary national crisis of unemployment.

To analyze the significance of this distinction, however, we have to contrast the application of domestic law with that of foreign law.

<sup>28</sup> See HUECK in Hueck and Nipperdey, 1 *Lehrbuch des Arbeitsrechts* (1931) 8, who points out that this essentially theoretical question has a great practical significance for jurisdiction of courts and application of the general rules concerning contracts. Our query furnishes a third practical angle.

<sup>29</sup> NIPPERDEY in 2 *Lehrbuch*, just cited n. 28, (1932) 131 § 12.

*Public law of the forum.* The distinction is of great importance with respect to the various kinds of substantive rules of the *forum*. Prohibitions, established in public law, apply irrespective of the conflicts rules accompanying private law institutions. As an example, we may recall the principles elaborated in the American courts before Prohibition, in the application of the laws of "dry" states against the sale of intoxicating liquor.

A court of a dry state, as a matter of course, had to enforce its own statute for the purpose of general welfare. Except in so far as the legislature was restrained by constitutional provisions, an annotator said, the state could forbid any action for the recovery of the purchase price of intoxicating liquor, even

"with respect to a sale every element of which, from the solicitation of the order to the consummation of the executed contract by delivery of the goods, had its situs in another state the law of which permitted such sales; and this, too, without reference to any intention upon the part of either party to violate or evade the laws of the forum."<sup>30</sup>

When a court, however, was not bound by a statute, it would not refuse to entertain such an action merely because the sale, if made at the forum, would have been invalid, when there was no intention to violate or evade the law of the forum.

Thus, a sale made outside the state was commonly enforced even though the order was solicited by an agent in the state.<sup>31</sup> But some local statutes were construed as prohibiting also such preliminary steps, or as outlawing any transactions that contemplated introduction of the liquor into the forum.<sup>32</sup>

All this resembles private international law but is es-

<sup>30</sup> Note, Conflicts of laws as to sales of intoxicating liquor, 61 A. L. R. (1903) 417, 418.

<sup>31</sup> E.g., *Wind v. Iller & Co.* (1895) 93 Iowa 316, 321, 61 N. W. 1001, 1002.

<sup>32</sup> STUMBERG 371.

entially independent. Whether the object of a sale be liquor or anything else, no such grounds for invalidity as error, lack of authority of a representative, or incapacity to contract, nor the problems of nonperformance have ever been subjected to the law of a jurisdiction where negotiations have merely started. No statute would undertake to impress its normal domestic rules on contracts, "every element of which has its situs in another state." A state may also think it suitable to insist on annulling a sale of intoxicating liquor, narcotics, or weapons, despite an agreement of the parties submitting them to another law, although there is no other reason for challenging this choice of law by the parties.

If thus, for fundamental clarification, we have to recognize the need of a separate delimitation of each administrative prohibition of the forum, it must be emphatically postulated that legislators and courts confine them within narrow boundaries. Extensions such as those described ~~above~~ relating to the domain of liquor laws, or of many tax statutes, do not favor a sound development of international law, either administrative or private. In many cases, reasonable interpretation may well be satisfied with applying a domestic administrative prohibition exactly to the same contracts that ought to be governed by the private law of the forum, namely, the contracts centered there. Interfering with private contracts for purposes of general welfare is a matter delicate enough and should not be aggravated without cogent reasons by attacks on foreign contracts too.

When a contract, however, is not within the local domain of the forum's prohibition, the ordinary conflicts rules apply. The courts know perfectly well that beyond those limits, an administrative policy of the forum is not usually susceptible of being taken as an absolute standard, overriding conflicts law and foreign law. A contract made and to be performed in Mexico could produce an action for payment of delivered

intoxicating liquor, enforceable in Arizona despite the Eighteenth Amendment then in force.<sup>33</sup> While, the court said, there were previous cases reluctant to enforce a foreign transaction which the law of the forum would disapprove, later decisions have realized the necessity that the course of trade

"... should be encouraged and fostered for mutual welfare. Of those Mexicans with whom we make valid contracts in this country, we expect faithful performance or the right to secure redress through Mexican courts. Adverse decisions on grounds of policy will breed suspicion or discrimination against us. We should be careful not to give less than we expect to receive."

*Sunday contracts.* Another informing example is the treatment of Sunday contracts in American courts. Among eight cases cited by Beale,<sup>34</sup> in four the validity of the transaction was recognized under the *lex loci contractus*.<sup>35</sup> In one case, under the *lex loci solutionis*,<sup>36</sup> and in two cases where the contract was made between persons present and naturally subject to the law of the place of contracting,<sup>37</sup> invalidity was pronounced, evidently for individual equitable considera-

<sup>33</sup> Veytia v. Alvarez (1926) 30 Ariz. 316, 329, 247 Pac. 117, 121, 122. *Contra*: Ayub v. Automobile Mortgage Co. (Tex. Civ. App. 1923) 252 S. W. 287, representing a minority view, as stated by STUMBERG 252 n. 71.

<sup>34</sup> 2 BEALE 1233 ns. 1 and 6 and 1235 n. 6.

<sup>35</sup> Swann v. Swann (E. D. Ark. 1884) 21 Fed. 299, Caldwell, J., declaring that the prohibition of Sunday contracts in Arkansas is not meant to constitute a strong public policy; Brown v. Browning (1886) 15 R. I. 422, 7 Atl. 403 (contract made in Connecticut after sunset on Sunday valid by Conn. statute); McKee v. Jones (1890) 67 Miss. 405, 7 So. 348 (sale of a horse, clearly governed by the law of Louisiana where it was permitted); Watkins Co. v. Hill (1926) 214 Ala. 507, 108 So. 244. *Add* Stamps v. Frost (1935) 174 Miss. 325, 164 So. 584 (terms agreed upon on Sunday in Tennessee, executed on Monday; contract would have been void if agreed to on Sunday in Mississippi).

<sup>36</sup> Brown v. Gates (1904) 120 Wis. 349, 97 N. W. 221, rehearing denied (1904) 98 N. W. 205. See the comment by BATIFFOL 50 n. 1.

<sup>37</sup> Strouse v. Lanctot (Miss. 1900) 27 So. 606 (judgment for a resident who had been persuaded by a traveling salesman on a Sunday to order a number of suits); Lovell v. Boston & Maine R. Co. (1910) 75 N. H. 568, 78 Atl. 621 (the waiver of liability of the railway invalidated, but nevertheless the liability affirmed on torts principles, the action being an "action on the case").



tions. Only one case remains where the court had some chance to validate the contract under the law of the place of payment, but invalidated it under the law of the forum, in which all other elements were located, as the court took care to state.<sup>38</sup> Far from reading into the domestic statute an absolute standard of religious behavior, the courts are acutely aware of the territorial limits. Prevailingly, the practice in this field implements the policy described by Williston whereby in the main, "the courts have been astute so to interpret contracts as to find them not to conflict with Sunday statutes or to hold them to have become executed and, therefore, unassailable."<sup>39</sup>

In a similar way, it has been held in British Columbia that a contract of indemnity for bail, there illicit, is enforceable when made in proceedings in the State of Washington where the agreement is lawful, such contract not being "inherently repugnant to moral and public interests."<sup>40</sup>

In a Texas decision, the antitrust laws of Oklahoma were held to prevent enforcement of a contract made in Minnesota, but performable in Oklahoma. Only because the Oklahoma statutes were not proved and were presumed to be identical with the Texas antitrust law the latter was applied; an added reservation of the court's right to limit "comity" may be taken as harmless.<sup>41</sup>

*Foreign governing law.* We are on traditional ground, when a transaction is governed by a foreign private law and declared void by this law as a consequence of a provision of its public law. Although rarely expressed in the literature, the opinion seems common everywhere that on principle a foreign-governed contract is subject to all prohibitions of the

<sup>38</sup> *Arbuckle v. Reaume* (1893) 96 Mich. 243, 55 N. W. 808.

<sup>39</sup> WILLISTON, 6 Contracts 4816 § 1700.

<sup>40</sup> *National Surety Co. v. Larsen* [1929] 3 D. L. R. 79 (Brit. Col. C. A.), [1929] 4 D. L. R. 918, 943.

<sup>41</sup> *Watkins Co. v. McMullan* (Tex. Civ. App. 1928) 6 S. W. (2d) 823.

governing law, irrespective of their purpose. The foreign private law applies, whether or not it is influenced by administrative law.<sup>42</sup>

For what reason the private law of Michigan avoids a contract governed thereby—be it because of measures exercised under the police power or because of measures for the protection of children, employees, or insured persons—is of no concern to the private international law of other jurisdictions. When a corporation is doing business in a foreign state without authorization and that state avoids contracts thus made, the nullity is recognized wherever the law of that state is held to govern the contract.<sup>43</sup> Continental courts decide in the same way.<sup>44</sup>

This principle, of course, is exposed to the exception of the public policy of the forum, when the latter clashes with the foreign public interest underlying the decision of the private law problem. War measures of the enemy are absolutely incapable of enforcement. Exchange restrictions serving economic warfare in times of political peace, confiscation, or impairment of private property, when reaching beyond the borders of the foreign state, are repudiated.<sup>45</sup>

## 2. Policy of Private Law

If, thus far, judicial practice as a whole agrees with the facts of international legal life, the problem is different in the narrower sphere of the typical interests safeguarded by private law. The problem is this: Should such social policy as pursued in insurance or usury statutes, or the economic

<sup>42</sup> MELCHIOR 267 §§ 179-181 with instructive exposition of the German practice, a Dutch and a French case. *Adde* Swiss BG. (Dec. 14, 1920) 46 BGE. II 490, 495. *Contra*: NEUMEYER, 4 Int. Verwaltungs R. 249 n. 67 without any persuasive reason.

<sup>43</sup> See *supra* pp. 206 n. 147, 214 n. 188.

<sup>44</sup> E.g., OLG. Hamburg (May 23, 1907) Leipz. Z. 1908, 249.

<sup>45</sup> For some comparative notes, see RABEL, "Situs Problems in Enemy Property Measures," 11 Law and Cont. Probl. (1945) 122-123.

policy inspiring national legislation on the liability of public carriers override the court's own conflicts rules? For in all these cases the interests of the individual customers are primarily protected, although the frequency of these contracts is deemed to warrant special legislation.

To face the problem more closely, the premise of this inquiry may be remembered, namely, that the contract at bar is not sufficiently connected with the forum to call for the application of the *lex fori* as the governing law; on the contrary, the contract is considered to be centered in a foreign jurisdiction. The question, then, is: Should this contract, nevertheless, be affected by the policy of the domestic law concerning private interests?

It is submitted that this question should be strictly answered in the negative, and that the courts, particularly the American courts, prevailingly do reach the same result, although a few cases here and there uphold the pretension of an unrestricted sovereign discretion.

While we shall continue to discuss the present role of public policy with each particular subject, we may contemplate here some popular prototypes of a paramount policy of the forum.<sup>46</sup>

<sup>46</sup> For an outstanding example of a borderline case, we may refer to the provision of the German law on revalorization of 1925, mentioned above p. 547, which revived debts paid with heavily depreciated money. Public policy was advanced as an objection by Trib. civ. Seine (April 9, 1930) Clunet 1930, 1012 and Trib. Genève (May 31, 1930) Revue 1930, 395, and implicitly by the French Cass. (civ.) (April 14, 1934) S.1935.1.201, justly criticized by NIBOYER *ibid.* The exception of public policy was, however, disregarded by Trib. Mixte Cairo (Feb. 17, 1930) Clunet 1931, 467, and thoroughly refuted by the Swiss Federal Tribunal (Feb. 26, 1932) 58 BGE. II 124, 126. BARTIN, Note, Clunet 1931, 470 asserted territorial limits for retroactive laws. ARMINJON, Revue 1930, 385 claimed that the German law was inapplicable as "political." The French Court of Cassation in another case, Cass. (req.) (Oct. 19, 1938) Gaz. Pal. 1938 II 886 reached the same result by interpreting the intention of the parties as directed to extinguishing definitely the debt; see *contra* the note *ibid.* For a more powerful argument see *supra* Chapter 32, P. 547 and n. 114.

## C. EXAMPLES

## I. Wagering Contracts

Foremost under the typical examples of contracts unenforceable under cogent laws of the forum are gambling and wagering contracts. Differences of legal treatment are frequent enough, particularly with respect to the more serious problems of speculative bargains, to provoke conflicts of laws. A well-known decision of the New Jersey Supreme Court of 1884 demonstrates the intransigent point of view.<sup>47</sup> A speculation in stocks upon margins was validly undertaken under the rules of New York, but the court declared it an offense against "the plain public policy" of New Jersey, because a transaction of exactly the same kind would have been unlawful there. Enforcement, thus, was refused against a resident of the forum. As Goodrich observed, "it would be hard to find a more striking instance of an 'intolerable affectation of superior virtue'—the famous words of Judge Beach—by one state toward another."<sup>48</sup> That the Restatement has adopted this decision<sup>49</sup> is inconsistent with its own praise of uniform enforcement of rights acquired in other states.

But what in this country may count as an irregular solution, commonly occurs in many, if not most European jurisdictions. The domestic restrictions on dealing in futures are either regarded as an absolute moral standard, or as an ineluctable screen of protection for the domiciliaries of the forum.<sup>50</sup> Thus, the prevailing French doctrine always refuses

<sup>47</sup> *Flagg v. Baldwin* (1884) 38 N. J. Eq. 219, 48 Am. Rep. 308; accord, *Coffe & Carkener v. Wilhite* (1916) 56 Okla. 394, 156 Pac. 169.

<sup>48</sup> GOODRICH, *op. cit. supra* n. 1, at 171.

<sup>49</sup> Illustrations respecting gambling debts and dealing in cotton futures, to § 612.

<sup>50</sup> See BRÄNDL, *Internationales Börsenprivatrecht* (Marburg 1925) 156ff.; AMIEUX, 2 *Répert.* 442 No. 21ff.; NIBOYET, 10 *Répert.* 92; GUTZWILLER 1572; BRÄNDL, 2 *Rechtsvergleichendes Handwörterbuch* 599.

For Switzerland, see 58 BGE. II 52; 61 *id.* II 117.

enforcement, if it would be denied by the French law of 1885, which, it is true, allows a relatively large place for dealing in futures at exchanges. Where the contract is unenforceable under the foreign governing law itself, even though this law may follow from party agreement, this prohibition, too, is mostly observed.<sup>51</sup> The elaborate German law distinguishes between valid dealings at German stock and commodity exchanges (requiring specific personal qualifications) and unenforceable speculative contracts. All foreign transactions that would be subject to the exception of *wager*, if made in Germany, are unenforceable against persons domiciled in Germany.<sup>52</sup> Moreover, agreements involving business at legitimate foreign exchanges, such as an order of a domiciliary to a broker in Liverpool<sup>53</sup> or New York<sup>54</sup> to sell or buy cotton or coffee at the local exchange,<sup>55</sup> or to sell stock for delivery "*ultimo*" at the Stock Exchange in Paris, is open to the exception that effective delivery or reception was not intended; foreign transactions, it is explained, are not certain to afford the public the same guarantees as institutions under the control of the German government.<sup>56</sup> In well-deserved

<sup>51</sup> See for citations AMIEUX, 2 Répert. 443 Nos. 24, 27; PILLET, 2 Traité 239, 240 § 514; SURVILLE 359ff. § 248; NIBOYET, 10 Répert. 132 No. 240 *bis*, 246. To the same effect, Institute of International Law (Paris 1910) Revue 1910, 956.

Greece: App. Athens (1904, No. 1150) Clunet 1908, 245.

Switzerland: C. Obl., art. 513; the identical section of the former text has been treated as of public order, BG. (Feb. 10, 1905) 31 BGE. II 55, 60; (Feb. 2, 1932) 58 *id.* II 48, 52; (June 4, 1935) 61 *id.* II 114.

App. Douai (Nov. 2, 1933) Clunet 1934, 1195.

<sup>52</sup> German Exchange Law (Börsengesetz) of 1908 § 61; BGB. §§ 762, 764; RG. (Feb. 7, 1899) 43 RGZ. 91; (July 8, 1899) 44 RGZ. 52, 54 and many subsequent decisions. See STAUB-HEINICHEN in 4 Staub § 376, Anhang 66 n. 80, 100 n. 197.

<sup>53</sup> RG. (Jan. 30, 1917) 89 RGZ. 358.

<sup>54</sup> RG. (Oct. 14, 1931) 134 RGZ. 67, 70.

<sup>55</sup> RG. (July 13, 1901) 49 RGZ. 59: the New York broker was represented by an agent in Hamburg, but this does not change this aspect of the case. RG. (June 15, 1903) 55 RGZ. 183 involved stock transactions at exchanges in New York and Chicago.

<sup>56</sup> 89 RGZ. 359, *supra* n. 53. The Austrian Supreme Court extended the

criticism, this attitude has been termed an offense against the natural international boundaries.<sup>57</sup> The Anglo-German Mixed Arbitral Tribunal refused to consider the German notions.<sup>58</sup> The Reichsgericht, however, drew a further undesirable consequence from them, by applying the principle that prohibited contracts may not be enforced by agreement for foreign arbitration, jurisdiction, or foreign law.<sup>59</sup>

As another example of intolerance, a recent Belgian decision refuses enforcement to a stock exchange operation validly made in Paris, if it can be proved that the parties did not intend factual delivery of the securities.<sup>60</sup> The Seine Tribunal even held that because the French law prohibited "*le pari aux courses de chevaux*" other than "*pari mutuel*,"<sup>61</sup> a partnership to exercise a license of the Hungarian Jockey Club for race betting was unlawful and that a partner could not ask for an accounting on the business done.<sup>62</sup>

Contrary views definitely prevail in the Anglo-American orbit. As is well known, Lord Mansfield's approach in case of a foreign loan given for gambling purposes was different, stressing the fact that the loan was valid where given and

domestic absolute prohibition on grain dealings in futures to foreign transactions and seems to have been followed in this claim by the Czechoslovakian Supreme Court (March 2, 1934) 10 Zausl.PR. (1936) 168.

<sup>57</sup> BRÄNDL, *supra* n. 50, 176, 183.

<sup>58</sup> Gruning and Co. v. Gebrüder Fraenkel (Feb. 6/17, 1922) 1 Recueil trib. arb. mixtes 726 (contract made subject to the Rules of the Liverpool Cotton Association).

<sup>59</sup> Germany: RG. (May 18, 1904) 58 RGZ. 152 (leading case). For thorough criticism see LUDWIG RAISER, *Das Recht der allgemeinen Geschäftsbedingungen* (1935) 139, 143 and n. 2. For other countries, see BRÄNDL, *supra* n. 50, 209 n. 52.

<sup>60</sup> Trib. civ. Liège (Jan. 13, 1936) summarized in 38 Bull. Inst. Int. (1938) 258 No. 10191.

<sup>61</sup> Cf. the analogous American statutes in the cases discussed by WILLISTON, 6 Contracts 4703 § 1665 n. 6.

<sup>62</sup> Trib. civ. Seine (June 2, 1922) Clunet 1924, 429. The court simply applied the French law, and as the note judiciously observes, the decision should have referred to the French *ordre public*—as though then it would be correct.

resulting in judgment for the plaintiff to the extent of the money lent.<sup>63</sup> Several cases followed his application of English law *qua lex loci solutionis*, presumably intended by the parties,<sup>64</sup> while, in a contrary opinion, the English gaming statutes were held to have no bearing at all on foreign games.<sup>65</sup> In other cases, where the contract made no reference to English localities, actions for recovery of gain in gambling or of a loan for gambling, were enforced on the ground of the validity of the transaction in Baden-Baden<sup>66</sup> or Monte Carlo.<sup>67</sup> Whatever law may have been declared applicable, the courts, during the growing complication of British legislation on gaming,<sup>68</sup> gave no quarter to the exception based on public policy of the forum.

In a case of 1933, a Missouri court thought that "the overwhelming weight of authority in this country is that gambling transactions will not be recognized as valid in states having statutes declaring such gambling contracts and transactions illegal and void, even where they are perfectly valid in the state where entered into."<sup>69</sup> But the court in this case was clearly impressed by suspicion of many dishonest manoeuvres, including false personation, narcotizing tablets, and card sharpers, all this scenario being employed against rustic innocence. Whether really much authority is available, seems

<sup>63</sup> *Robinson v. Bland* (1760) 2 Burr. 1077, 1 W. Bl. 234; cf. *Cozens-Hardy, L. J.*, in *Moulis v. Owen* [1907] 1 K. B. 746, 755ff.

<sup>64</sup> *Story v. McKay* (1888) 15 O. R. 69 (note executed in New York payable in Ontario); *Moulis v. Owen* [1907] 1 K. B. 746 (baccarat game in Algiers, check payable in London).

<sup>65</sup> *Fletcher Moulton, L. J.*, dissenting in *Moulis v. Owen*, *supra* n. 64, at 757; DICEY, Note, 23 Law Q. Rev. (1907) 249, approved in a Note by SIR FREDERICK POLLOCK, *id.* at 251.

<sup>66</sup> *Quarrier v. Colston* (1842) 1 Phillips 147.

<sup>67</sup> *Saxby v. Fulton* [1909] 2 K. B. 208; DICEY 650 illustration 2 n. (1) approves.

<sup>68</sup> See FALCONBRIDGE, "More Anomalies in the Law of Wagering Contracts," 9 Can. Bar Rev. (1931) 331.

<sup>69</sup> *Maxey v. Railey & Bros. Banking Co.* (Mo. 1933) 57 S. W. (2d) 1091, 1093.

doubtful; however, games of chance, indeed, are not worthy of serious judicial consideration, nor of scholarly discussion.

With respect to dealings in futures, however, or, in another version, with respect to contracts for commercial objects,<sup>70</sup> although the Supreme Court of the United States has rather purposefully avoided deciding the issue under the Full Faith and Credit Clause,<sup>71</sup> in conflicts law the weight of authority is represented again by holdings of the Missouri courts. Missouri has severe prohibitions against dealings in futures, but these statutes are declared to have no extraterritorial effect on contracts made in other states dealing with the rise and fall of stocks, bonds, and commodities; the recognition includes brokerage contracts made in the state when the transactions are to be performed outside the state.<sup>72</sup> The governing law, hence, also determines whether there is a gaming contract.<sup>73</sup>

Peculiar difficulties seem to arise only from the doctrine

<sup>70</sup> CORBIN, *Cases on Contracts* (ed. 2, 1933) 1128 n. 10.

<sup>71</sup> *Bond v. Hume* (1917) 243 U. S. 15. The Supreme Court has not contested however, the view of the Missouri Court in the cases of the following note.

<sup>72</sup> *Edwards Brokerage Co. v. Stevenson* (1901) 160 Mo. 516, 61 S. W. 617; dicta and citations in *Elmore-Schultz Grain Co. v. Stonebraker* (1919) 202 Mo. App. 81, 214 S. W. 216; *Claiborne Commission Co. v. Stirlen* (Mo. App. 1924) 262 S. W. 387. Strangely deviating, *McVean v. Wehmeier* (1923) 215 Mo. App. 587, 256 S. W. 1085 applying Missouri law because the contract was made in the state and ignoring the string of cases in point. Cf. in general, MINOR 384 § 161, 422 § 176.

The cases cited seem simply to apply the law of the place of performance. But the federal courts have employed various methods in order to validate orders performable on a "contract-market" authorized by federal statute (7 U. S. C. A. §§ 1ff., Supp. 1945). See Notes, 40 Harv. L. Rev. (1927) 638; 81 U. of Pa. L. Rev. (1933) 881.

The statutes in question, Mo. Rev. Stat. 1939, §§ 4714-4716, 4719, are sharply distinguished from the provisions against bucket shops, Rev. Stat. 1939, §§ 4706-4713, which are considered to make contracts illegal irrespective of transactions on a foreign market, and are not superseded by the federal statutes on grain futures, see *Dickson v. Uhlmann Grain Co.* (1932) 288 U. S. 188, 196 n. 2. In a subsequent decision, *Wolcott & Lincoln v. Humphrey* (1938) 119 S. W. (2d) 1022, the Missouri Supreme Court seems to overrule the entire distinction, but in fact emphasizes merely the section, then 4318 (Rev. Stat. 1939, § 4708), which belongs to the bucket shop law.

<sup>73</sup> *Hood & Co. v. McCune* (Mo. App. 1921) 235 S. W. 158.



that recovery cannot be had on a note or bill or mortgage, illegal or void for want of consideration in the place of performance. On the latter ground, English courts have refused enforcement of a check given as security for a foreign gambling debt but allowed the creditor to sue on the debt itself<sup>74</sup> and American courts have been influenced by this strange view.<sup>75</sup>

To justify the German refusal to enforce foreign wagers, the argument has been advanced<sup>76</sup> that enforcement is a matter of procedure, since in German law an obligation to pay is recognized to the extent that money paid to discharge a gaming debt cannot be recovered.<sup>77</sup> But in correct analysis, the absence of the right to sue is a defect of the obligation, to be classified along with voidness and other forms of inefficacy.

*Lotteries.* Also in the related field of lotteries, several American courts have clearly applied the foreign law. As early as a century ago, when an obligation was entered into to sell lottery tickets in Kentucky, on the basis of an enactment by that state for the benefit of a college, a New York court held that the contract, valid where performable, was enforceable, irrespective of the prohibition of lotteries by New York statutes.<sup>78</sup> In other cases, the law of the place where the ticket was sold, or a partnership in lottery tickets was formed, has been applied.<sup>79</sup> But that the policy of the

<sup>74</sup> *Moulis v. Owen*, *supra* n. 64; *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* [1927] W.N. 78.

<sup>75</sup> *Thuna v. Wolf* (1928) 132 Misc. 56, 228 N. Y. Supp. 658, declares the action on the gambling debt itself to be possibly enforceable.

<sup>76</sup> KAHN, 1 *Abhandl.* 188 who characteristically referred at the same time to the then treatment of the Statute of Frauds; recently RAAPE, D. IPR. 62 again argues to this effect.

<sup>77</sup> See BGB. § 762 par. 1 sent. 2.

<sup>78</sup> *Commonwealth of Kentucky v. Bassford and Nones* (1844) 6 Hill 526.

<sup>79</sup> *M'Intyre v. Parks* (Mass. 1841) 44 Mass. 207; *Thatcher v. Morris* (1854) 11 N. Y. 437; *Roselle v. McAuliffe* (1897) 141 Mo. 36, 39 S. W. 274; 2 BEALE 1240.

forum does not decide by itself, is the generally accepted doctrine, well grounded in the territorial character of such statutory prohibitions. In a recent revival of Dicey's<sup>80</sup> contrary proposition, it has been asked: Why should the forum be compelled, in a lottery action by or against a resident, to subordinate its policy to the policy of another state?<sup>81</sup> But the answer is simple. The policy of such a law does not extend to every suit coming before its courts nor to all contracts "made" in its territory, but only to the contracts centered within the forum. The old case in the matter of the Kentucky lottery, mentioned before, is correct also on this point.

*Indorsed gaming notes.* Of particular informative value is a series of cases dealing with innocent indorseees of notes issued to pay gaming debts or to furnish the means for wagering. By a universally favored rule, any illicit cause of an obligation embodied in a negotiable instrument is no defense against an indorsee ignorant of the facts. This, in the vast majority of countries and courts, extends to notes and bills, originating in gambling.<sup>82</sup> The North Carolina court has remarked that it would encourage vice, if a successful gambler could obtain the value of such a note by indorsement and then render his obligation ineffective by pleading his own wrongdoing.<sup>83</sup> Statutes annulling private contracts for reasons of general social welfare, if not handled with great caution, have an unfortunate tendency to defeat their own purpose. However, the Illinois Supreme Court has maintained a practice, allowing the plea of prohibited gambling against an innocent indorsee despite a contrary law governing the indorsement.

<sup>80</sup> DICEY 655 illustration 7, without any case citation to support it.

<sup>81</sup> NUSSBAUM, Principles 123, as example for the thesis quoted *supra* n. 26.

<sup>82</sup> WILLISTON, 6 Contracts 4729 § 1676; Restatement of the Law of Contracts § 590; FALCONBRIDGE, 1 Banking and Bills of Exchange (ed. 5, 1935) 712. The same is recognized even in Switzerland which has the most intransigent attitude in Europe against wagering, see C. OBL., art. 514 par. 1 *in fine*.

<sup>83</sup> Wachovia Bank and Trust Co. v. Crafton (1921) 181 N. C. 404, 107 S. E. 316.

The practice goes back to a decision where the notes were all dated at St. Louis and payable at the same place. The bargain consisted of mere speculations upon the future prices of grain and under Missouri law was void, but this defense could not be objected against an ignorant indorsee who had acquired the notes before maturity. The Illinois court referred to the Criminal Code of Illinois and to its own previous views, to the effect that the transaction was

"Not only contrary to public policy but it is a crime—a crime against the state, a crime against religion and morality, and a crime against all legitimate trade and business."<sup>84</sup>

That this is still the law in Illinois,<sup>85</sup> shows how muddled the considerations of "public policy" are. Such violent moral indignation, of course, may impel a court to protect the bench from contamination with the outrageous foreign law. Not a difference in laws or legal systems but deep-seated moral inconsistency of a foreign-created right with the domestic principles compels resort to public policy. However, the outburst is somewhat misplaced. A wise court should not take the attitude of a conscientious objector, when it is asked to give an innocent indorsee what he would receive in nearly every other jurisdiction.

In the soundest decisions, the exception of public policy, in fact, is reduced to the function of an objectively ascertained moral sense:

"A contract that is valid where made and that does not involve any morale turpitude, and is not pernicious and detestable will be enforced in a state although the laws of such state forbid the making of such contract."<sup>86</sup>

<sup>84</sup> Pope v. Hanke (1894) 155 Ill. 617, 630, 40 N. E. 839, 843.

<sup>85</sup> Thomas v. The First Nat'l Bank of Belleville (1904) 213 Ill. 261, 72 N. E. 801: although the contract is licit in Missouri and the District of Columbia, it is not enforceable, since it violates the penal laws of Illinois! See for other cases, 38 Ill. Ann. Stat. (1934) 406ff., annotations to § 329; the Supplement of 1944 has no additions.

<sup>86</sup> American Furniture Mart Bldg. Corp. v. W. C. Redmon Sons & Co. (Ind. 1936) 1 N. E. (2d) 606 at 609, HARPER & TAINTOR, Cases 801 (cognovit

## 2. Various Contracts

*Champerty.* The old absolute prohibition of "champerty" was conceived as a prohibitory law making void any agreement to share in the future proceeds of a law suit. The traditional English approach that the disapproval affected contracts wherever made<sup>87</sup> is hardly to be encountered any more.<sup>88</sup> On the one hand, the scope of the offense of champerty has shrunk, in the opinion of American jurisdictions, so as to embrace no more than an officious interference, without proper interest, in other people's obligations,<sup>89</sup> and its collateral effects have been more or less weakened.<sup>90</sup> On the other hand, the American courts usually admit any solution offered by the law of the place where suit for enforcement of the debt is brought.<sup>91</sup>

Beale and other writers<sup>92</sup> have reproached this practice for failing to distinguish between prohibited agreements to be governed by the *lex loci contractus* and prohibited suits,

note validly executed in Illinois; if enforcement were refused, people in Indiana would be invited to fraud by signing notes in Illinois unavailable in their own courts). The decision refers to *International Harvester Co. of America v. McAdam* (1910) 142 Wis. 114, 124 N. W. 1042; *Garrigue v. Keller* (1905) 164 Ind. 676, 74 N. E. 523, 527. These cases follow one of the rules in *ELISHA GREENHOOD, The Doctrine of Public Policy in the Law of Contracts* (Chicago 1886) 46.

<sup>87</sup> *Grell v. Levy* (1864) 16 C. B. N. S. 73; DICEY 654 illustration 3; *LEFLAR, Arkansas Conflict of Laws* 217 n. 64 points to two Arkansas cases, viz., *Arden Lumber Co. v. Henderson Iron Works* (1907) 83 Ark. 240, 103 S. W. 185; *White-Wilson-Drew Co. v. Egelhoff* (1910) 96 Ark. 105, 131 S. W. 208. But these cases deal with notes incorporating ten per cent for attorney's fees, valid under Louisiana law, but declared unenforceable in Arkansas, being private penalties. This is a different type of case.

<sup>88</sup> *Alberta: Waters v. Campbell* (C. A. Alberta 1913) 25 W. L. R. 838, 6 W. W. R. 957, *LEFLAR, Arkansas Conflict of Laws* 217 § 97.

<sup>89</sup> *Gilman v. Jones* (1889) 87 Ala. 691, 5 So. 784, 787, 7 So. 48. For details see *WILLISTON, 6 Contracts* 4834ff. § 1712; *Restatement, Contracts* § 542.

<sup>90</sup> *WILLISTON, 6 Contracts* 4841ff. § 1713.

<sup>91</sup> *Richardson v. Rowland* (1873) 40 Conn. 565; *Gilman v. Jones* (1888) *supra* n. 89; *Roller v. Murray* (1907) 107 Va. 527, 59 S. E. 421. In *Blackwell v. Webster* (1886) 29 Fed. 614 the law of the place of contracting was applied.

<sup>92</sup> 2 BEALE 1231; STUMBERG 241.

enforceable or not according to the law of the place of performance, which place seems to be identified with the place where the court is sitting. At the same time, this border line is described as practically difficult to trace. But the place of the law suit is not necessarily the place of "performance" of an accounting between the parties to the agreement; nor should it be material for the question which statute applies, whether some statutes continue to make the agreement void and the others merely prohibit the law suit. The view of the courts should be supported, not by mechanical rules but rather by the fact that the agreement is centered at the place where the suit is intended to be brought. However, in each of these opinions, the idea of an absolute prohibition affecting all foreign agreements is left far behind.

*Other examples.* Similarly, it has been held in Alabama that assignment of a life insurance policy to a person with no insurable interest in the life of the insured was validly executed in New York and to be enforced as against the law of the forum, since it comprised nothing inherently bad.<sup>93</sup> The contrary, it is true, has recently been held to be the view of Texas, by a federal court in that state.<sup>94</sup>

Again, general opinion repudiates the use of public policy to enforce the forum's conception of annulment for duress.<sup>95</sup> Examples can be multiplied.<sup>96</sup>

*Protection of personality.* Statutory provisions for the protection of workers or employees in employment contracts (not in the class of "territorial" provisions respecting health or

<sup>93</sup> *Haase v. First Nat'l Bank of Anniston* (1919) 203 Ala. 624, 84 So. 761.

<sup>94</sup> *Griffin v. McCoach* (C. C. A. 5th 1941) 123 F. (2d) 550, 551. The Supreme Court of the United States had previously recognized the constitutional freedom in "public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers," *Griffin v. McCoach* (1941) 313 U. S. 498. Cf. MORGAN, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1944) 153 at 157 n. 8.

<sup>95</sup> *Supra* p. 525.

<sup>96</sup> For other examples see WILLISTON, 6 Contracts 5094 § 1792.

morality pertaining to public labor law) regularly apply only as a part of the governing law. Some doubt has affected the restrictions imposed on stipulations in employment contracts forbidding the employee to engage in activities competitive with the business for which he is engaged, during a certain time after termination of his services. The statutes vary greatly. Some nullify any such restraint of trade. Others allow three months, a year, three years, or a reasonable time. What law governs, is controversial, but prevailing opinion seems to favor the law of the place or places where services have been rendered.<sup>97</sup>

The exception of public policy, however, has rarely been used. Fry, J., did it with sweeping language in a well-known case of a French employment, but in this instance English law was the governing law.<sup>98</sup> In one case, an express stipulation for the law of the state controlling the employing company was disregarded, on the ground of public policy, as "ineffectual to avoid the statute of California, the place of performance."<sup>99</sup> A German decision extended the local restriction to a foreign contract of a German national in a foreign business place.<sup>100</sup> These two solutions are plainly wrong. The

<sup>97</sup> United States: 2 BEALE 1230; *Davis v. Jointless Fire Brick Co.* (C. C. A. 9th, N. D. Cal. 1924) 300 Fed. 1, 3. On the other hand, *Holland Furnace Co. v. Connelley* (D. C. E. D. Mo. 1942) 48 F. Supp. 543 applies the local Missouri law permitting the clause even in case Michigan law forbidding it were the governing law. Cf. *supra* pp. 383, 554.

Germany: A natural effect of the rule of *lex loci solutionis*.

Italy: App. Genova (April 18, 1904) Riv. Dir. Com. 1904 II 361 (employment of a teacher in Switzerland by the Berlitz School of Milan; Italian law applied, against the prohibition of the Swiss *lex loci contractus*).

<sup>98</sup> *Rousillon v. Rousillon* (1880) 14 Ch. D. 351, 369; see CHESHIRE 138.

<sup>99</sup> *Davis v. Jointless Fire Brick Co.* (C. C. A. 9th 1924) 300 Fed. 1, 3.

<sup>100</sup> Germany: OLG. Hamburg (April 6, 1907) 72 Seuffert's Blätter für Rechtsanwendung 672, for employees of German nationality, strange, but approved by NUSSBAUM, D. IPR. 274 n. 1 and apparently by LEWALD 244. Another decision, OLG. Dresden (Jan. 25, 1907) 14 ROLG. 345, forcibly introduces minimum terms for giving notice (HGB. § 67) into an English employment contract of a German employee; this has been criticized as going much too far even by NUSSBAUM, D. IPR. 274 n. 1.

first minimizes without justification the agreement of the parties on the applicable law, which would have satisfied even the theory requiring substantial connection therewith. A protective norm of California private law was treated as if it were a police regulation for the general welfare. The German case is typical for the unilateral "protection" of nationals, which easily may turn out to cause unfavorable discrimination against these nationals abroad.

On a broader plan, individuals are protected by modern private law against binding themselves by excessive obligations. The prototype of these provisions was the rule of the Code Napoléon that no one can engage his services but for a time or for a certain enterprise.<sup>101</sup> This fundamental law of emancipation from serfdom has justly been treated always as imperative also in conflicts law.<sup>102</sup> It is clear, however, that not the same exalted position belongs to the varying municipal rules determining in detail the time or place for which an individual may validly commit his services.<sup>103</sup>

The same is true, for instance, in the case where an irrevocable and all-inclusive power of attorney, without valuable consideration and any proper interest of the agent, was executed in New York for exercise in Germany. The two laws differed in allowing remedies against exploitation of the principal, but either law, if governing the contract, was good enough.<sup>104</sup> It would have been different, if one of the laws involved had not provided any aid against thoughtless disposition by a person of all his assets; but there is scarcely such a law.

<sup>101</sup> C. C. art. 1780.

<sup>102</sup> 8 LAURENT 243 § 169; WEISS, 4 Traité 376 and n. 4; 3 FIORE § 1119.

<sup>103</sup> ROUAST, Mélanges Pillet 210; CALEB, 5 Répert. 212 No. 53; more recently also BARTIN, "Une conception nouvelle de la loi locale," 52 Recueil (1935) II 583, 627, denies the application of *ordre public* to employments in foreign countries. To an opposite effect, 2 FRANKENSTEIN 336.

<sup>104</sup> The problem is studied by RABEL, "Unwiderruflichkeit der Vollmacht," 7 Z.ausl.PR. (1934) 797, 805, 807.

3. Immoral Transactions<sup>105</sup>

*Bribery.* In 1880, the Supreme Court of the United States<sup>106</sup> refused enforcement to the petition of the Turkish Consul General against the Winchester Arms Company for payment of a ten per cent commission unquestionably promised him by the firm. He had, by his influence, induced the purchasing agent of his government to accept the defendant's offer for very considerable deliveries. The Court took into account that the Turkish government at that time may have considered the behavior of the plaintiff, not paid for his work, as quite blameless; but the Court stated that the contract was corrupt.

"The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries. . . . Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement."<sup>107</sup>

The Court, in my respectful opinion, was right in deciding the case because the contract was made and to be performed in this country and gravely violated the American sense of propriety. The same reason explains why the Court, as it said, would always refuse enforcement to foreign contracts of such kind. But that "our laws" and "our policy" are as compulsory as "our morality," cannot be conceded.

*Lease of a gambling house.* In a well-justified contrast to the Italian decisions granting liberal enforcement to foreign

<sup>105</sup> English cases are collected by DICEY 653-655; M. WOLFF, *Priv. Int. Law* 181 § 172.

<sup>106</sup> *Oscanyan v. Arms Co.* (1880) 103 U. S. 261.

<sup>107</sup> *Id.*, *supra* n. 106, at 271, 272 and 277.



valid gaming contracts, the Court of Cassation in Rome<sup>108</sup> refused enforcement to an Egyptian judgment by which the leaseholder of a gambling house was held obligated to pay the rent. The offense was not seen so much in the aleatory character of the games as in the exploitation of dangerous human passions for egoistic purposes, as it was stressed that morality was violated. This reasoning is sound, if the refusal of the courts to deal with *res turpes* is ever considered sound.

#### D. CONCLUSIONS

Too great a margin has been left to the discretion of courts in disregarding the normal effects of conflicts rules. In this opinion, I feel encouraged by the results of Nutting. He suggests, however, a transfer from the courts to the legislatures of the selection of the domestic interests that are to be safeguarded from foreign encroachment.<sup>109</sup> A similar proposal was made in 1910 by the Institute of International Law: Every lawmaker should determine with utmost care which of his provisions may never be replaced by foreign law.<sup>110</sup> But do legislatures, in this respect, deserve more confidence than the majority of the judges who have learned to understand the necessary restrictions of local views? The evil could easily be aggravated by asking too many questions of the legislatures in each type of enactment.

The principle itself, rather, must be freed from its vague and all-inclusive character. Although no mechanical rule can shape the elusive exception of public policy, it may well be defined in a more reliable manner. Our results are as follows.

<sup>108</sup> Cass. Roma (March 26, 1926) *Monitore* 1926, 1, 406, *Clunet* 1926, 1092.

<sup>109</sup> NUTTING, 19 *Minn. L. Rev.*, *supra* n. 9, at 203, 209.

<sup>110</sup> See *Clunet* 1910, 976. The same idea was expressed by Mr. Baron Parke in *Egerton v. Earl Brownlow* (1853) 4 H. L. Cas. 1, 122, to the effect that English judges should refrain from defining the public good.

1. Conflicts rules delimiting the application of private law rules exist because the substantive rules of the various civilized jurisdictions are supposed to be exchangeable. This relationship should not be jeopardized at the forum by a pretended superiority of its own policies or legal techniques. The task of conflicts rules in the field of contracts is to determine to what state a contract belongs. This done, no uncertainty arising from uncontrollable evaluations should be tolerated.

2. However, the rules of private international law are limited to a part of the entire legal system. They have no power over the rules of domestic public law, including all rules serving the interests of the state itself and the general welfare. These rules are, or should be, accompanied by their own territorial delimitations. In their domain, they enjoy at the forum unconditional precedence over private international law. There is no uncertainty about that. But the boundaries should and may very well be chosen, quite as for our ordinary conflicts rules, so as to include in principle only the contracts centered within the forum.

3. Foreign private law is applicable as it is, however it may be influenced by foreign public interests. There is no way of distinguishing the purposes of foreign enactments and no reason why we should recognize the validity of transactions repudiated by the law to which we ourselves subject them, or to invalidate transactions only because we do not agree with the purposes of the legislation competent under our conflicts rule.

4. The only general barriers to foreign law in the sphere of private international law, that may prove indispensable, arise from the depth of basic moral conceptions, which in our times naturally include those of fundamental social justice. Therefore, we may refuse unqualified enforcement to a foreign law allowing serfdom, legalizing contracts involving prostitution, or denying effectual relief to children or incompetent persons. Among civilized nations, we should not ex-

pect to find any considerable number of such abnormities.

A step further, a court holding that in no case should a debtor be forced to utter ruin by the enforcement of a contract, may admit such defense, thus far unknown to American law, against an American contract.<sup>111</sup> But the differences of views respecting overwhelming difficulty of performance caused by unfavorable circumstances no longer appear so widely separated as to warrant invocation of public policy.<sup>112</sup>

Zitelmann contrasted good morals with offense to the internal law; likewise various modern laws literally restrict the application of public policy to cases where recognition of the foreign law would be inconsistent with *public order and morality*.<sup>113</sup> The idea is sound, if only it were not dissolved into blue fog.

5. We may thus summarize:

Under Dicey's exception of public policy, a contract (whether illegal by its proper law or not) is invalid if it or its enforcement is opposed to English interests of state, to the policy of English law, or to the moral rules upheld by English law.<sup>114</sup>

In the formulation advocated here, a contract valid by the law governing it, is nevertheless subject to the public law of the forum to the extent of proper territorial delimitation, and to deeply rooted and reasonable objections of good morals, including fundamental social justice.

6. What effect is due to a judgment refusing enforcement of a foreign-governed right on the ground of local public pol-

<sup>111</sup> See BATIFFOL 404 § 487.

<sup>112</sup> I am referring to a famous problem on which it suffices, for the present, to consult for American law, WILLISTON, 6 Contracts 551 § 1963, and for comparative law, RABEL, 1 Das Recht des Warenkaufs § 45.

<sup>113</sup> 1 ZITELMANN 334, 368.

Brazil: Introd. Law (1916) art. 17; Introd. Law (1942) art. 17.

China: Int. Priv. Law, art. 1.

Japan: Int. Priv. Law, art. 30.

Poland: Int. Priv. Law, art. 38.

<sup>114</sup> DICEY 652 Rule 160 exception 1.

icy? The most common view in the conflicts laws of all countries takes it for granted that such a judgment has the full effect of *res judicata*. Occasionally other ideas have been expressed. Mr. Justice Brandeis, speaking for the Supreme Court of the United States, has asserted that, if a state declines to enforce a foreign cause of action, "it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere."<sup>115</sup> The Court, of course, operated on the sole basis of the Full Faith and Credit Clause, and dealt with a special case of workmen's compensation. Even so, the dictum raises serious problems. But to transfer this solution into the sphere of conflicts law, as has been recently suggested by an eminent authority,<sup>116</sup> would promote strange results. Evidently, if a court will deny enforcement without altering the possible cause of action, it can sometimes do so by refusing to take jurisdiction on the merits,<sup>117</sup> in which case we should wish the court to pronounce expressly that it does not decide the merits. Our discussions on the applicable law, however, always presume that jurisdiction has been assumed. If so, a court should ordinarily enforce foreign rights, but if it does not, the common effects of taking cognizance must apply to the plaintiff. It would be rather dangerous to open an easy middle road for provincial minds.

## II. VIOLATION OF FOREIGN LAW

The exception of public policy is generally understood to point exclusively to the public policy of the forum.<sup>118</sup> A

<sup>115</sup> *Bradford Electric Light Co. v. Clapper* (1932) 286 U. S. 145 at 160. The question has also been touched upon in *International Harvester Co. of America v. McAdam* (1910) 142 Wis. 114, 120, 124 N. W. 1042, 1044.

<sup>116</sup> In addition to occasional dicta, recently this view has been taken by MORGAN, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1944) 153 at 156, 157.

<sup>117</sup> This desperate method of avoiding injustice has been mentioned but not applied in *Precourt v. Driscoll* (1931) 85 N. H. 280 at 283, 157 Atl. 525 at 527, cited by MORGAN, *supra* n. 116, at 190.

<sup>118</sup> See the interesting opinion of STORY §§ 245, 255-257.

sharp contrast thereto is marked by the thesis of English judges that they would not assist or sanction agreements breaching the law of a friendly foreign country.<sup>119</sup> It is a remarkable proposition, despite its vague form and rare application. Apart from the mistaken rule giving the law at the place of performance the power to invalidate the contract,<sup>120</sup> the most important case is one by which the English courts joined an international series of decisions against smuggling. We shall contemplate this interesting though isolated regard for foreign law.

*Smuggling.*<sup>121</sup> Under an old inherited view, foreign revenue laws are refused enforcement.<sup>122</sup> On this ground, English courts in the eighteenth century disregarded a Portuguese prohibition on export of gold<sup>123</sup> and a French prohibition of *assignats*.<sup>124</sup> In France, the Parlement d'Aix (1759) and the Court of Cassation (1835) held by the same approach that a contract contemplating the import of contraband into another country is not void, unless it includes 'corruption of the customs officers, clandestine measures (*ruse*) being immaterial.<sup>125</sup>

However, Pothier was the first, in the name of honesty, to protest against this indifference,<sup>126</sup> and later many French and

<sup>119</sup> *Supra* p. 535 n. 69.

<sup>120</sup> *Supra* pp. 536 f.

<sup>121</sup> A good comparative monograph: MESSINESI, *La contrebande en droit international privé* (Paris 1932).

<sup>122</sup> *State of Colorado v. Harbeck* (1921) 232 N. Y. 71, 133 N. E. 357; *Lorenzen*, Cases 269; for English cases, see WESTLAKE 291 § 213.

*In re VISSER*, H. M. *The Queen of Holland v. Drukker* [1928] Ch. 877, 884.

SACK, "(Non-) Enforcement of Foreign Revenue Laws, in *International Law and Practice*," 81 U. of Pa. L. Rev. (1933) 559.

<sup>123</sup> *Boucher v. Lawson* (1735) Hardw. 85, 89, 194, 195; dictum to the same effect by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341 in a tea-smuggling case.

<sup>124</sup> *Smith v. Marconnay* (1796) Peake Add. Cas. 81 N. P.; cf. 11 Eng. and Emp. Dig. 403.

<sup>125</sup> See MESSINESI, *supra* n. 121, at 17ff.; BATIFFOL 359 § 418; Cass. (req.) (August 25, 1835) S. 1835.1.673 (secret importation of food into Spain).

<sup>126</sup> *Oeuvres de POTHIER*, 5 *Traité du contrat d'assurances* (1847) § 58.

other writers followed him.<sup>127</sup> The German Supreme Court developed a consistently strict practice,<sup>128</sup> repudiating sales and agreements for carriage intended to infringe foreign customs laws or prohibitions on importing or exporting, for the protection of public welfare, such as, for instance, on importation of cocaine into British India.<sup>129</sup> The refusal included also loans to finance smuggling<sup>130</sup> and sales of alcohol deliverable on the high seas near the territorial waters of Sweden and Finland.<sup>131</sup> Three French appeal courts and that of Brussels shared in this doctrine,<sup>132</sup> under which it is immaterial what law governs the contract.

Finally, the Court of Appeals of London joined this view in a decision of 1928, with a dissenting vote maintaining the old theory.<sup>133</sup> By a contract governed by English law, whiskey was bought to be introduced into the United States during prohibition. The sales contract was declared unen-

<sup>127</sup> United States: 3 KENT 266; 2 WHARTON 1139 § 484.

England: POLLOCK, *Contracts* 361.

France and Belgium: 8 LAURENT 174ff. §§ 114-117; WEISS, 4 *Traité* 383 n. 3; DESPAGNET 909 § 307; VALÉRY 965ff. § 669; PILLET, 2 *Traité* 238 § 513 and in *Clunet* 1896, 1 at 8; 2 LYON-CAEN et RENAULT, Part I, 85ff. §§ 68-70.

Germany: VON MOHL, 1 *Staatsrecht, Völkerrecht und Politik* (1860) 724; HEFFTER, *Europ. Völkerrecht* (ed. 8, 1888) § 32 n. 9; NEUMEYER, 4 *Int. Verwaltungs R.* 423.

Switzerland: 2 BROCHER 92 § 160.

Against an isolated contrary view of PHILONENKO, *Clunet* 1930, 441ff., see BATIFFOL 356 § 414.

<sup>128</sup> Germany: RG. (Nov. 5, 1898) 42 RGZ. 295, 297; (Dec. 2, 1903) 56 RGZ. 179, 181; (Sept. 30, 1919) 96 RGZ. 282; and others.

Austria: OGH. (May 5, 1928) *Rspr.* 1928, 122 No. 253; (March 3, 1931) *Rspr.* 1931, 70, *Clunet* 1931, 1180.

<sup>129</sup> RG. (June 24, 1927) JW. 1927, 2288, IPRspr. 1926/27 No. 15; cf. OLG. Stuttgart (Sept. 25, 1891) *Clunet* 1894, 896 (gold exportation from Russia).

<sup>130</sup> RG. (March 10, 1927) JW. 1927, 2287, IPRspr. 1926/27 No. 17.

<sup>131</sup> RG. (Oct. 26, 1928) IPRspr. 1928 No. 20.

<sup>132</sup> France: App. Pau (July 2, 1886) *Clunet* 1887, 57 (affreightment); Trib. com. Douai (Nov. 11, 1907) S. 1907.2.308 (partnership for smuggling contraband into Belgium); App. Alger (Feb. 20, 1925) *Clunet* 1926, 701 (partnership for smuggling tobacco into Spain).

Belgium: App. Bruxelles (Feb. 17, 1886) *Clunet* 1887, 214.

<sup>133</sup> *Foster v. Driscoll* [1929] 1 K. B. 470, 518, 510.

forceable, by Lord Sankey with a reference to Dicey's rule respecting all prohibitions of the law of the place of performance, but by Lord Lawrence on the ground that the contract's recognition "would furnish a just cause for complaint by the U. S. Government against our Government . . . and would be contrary to our obligation of international comity, . . . and therefore would offend our notions of public morality."

The common basis of all these cases is the conviction that organized smuggling violates good morals and undermines the mores of the population along the frontiers. Many writers, therefore, have stressed the fact that the offense is to the forum's own public policy rather than to the foreign law. Nevertheless, Lord Lawrence's formulation, quite adequately, establishes as a basis respect for the foreign law under the forum's conception of public or, as it has often been put, of international morality.

This doctrine has encountered difficulties. Its most certain application is that where it is proved that both parties knowingly intended to circumvent a foreign prohibition on importation. On the other hand, an affreightment merely preparatory to smuggling has been held valid even in German courts.<sup>134</sup> Moreover, the mere knowledge of the vendor that the buyer intends to use the goods for smuggling is not sufficient; the contract must involve a promotion of smuggling. Also contracts having the effect rather than the purpose of violating foreign law have been approved.<sup>135</sup>

Between these two extremes, courts have enforced contracts, because of the lack of some aggravating element which they required for repudiating the bargain. Where a hotel manager of Maine acquired liquor in Massachusetts for re-

<sup>134</sup> RG. (Feb. 9, 1926) 69 Gruchot's Beiträge 78, IPRspr. 1926/27 No. 16.

<sup>135</sup> KG. (Oct. 10, 1928) IPRspr. 1928 No. 21.

sale prohibited in Maine, Mr. Justice Holmes, then a judge on the Massachusetts Supreme Court, recognized that it would be "barbarous isolation" for a state "to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbor's life." But, for the application of the foreign prohibition, he required a not too remote connection of the act of selling the liquor with the apprehended result, and in refusing the action for the price in the instant case, he did it on the assumption that the seller expected and desired the unlawful sale and intended to facilitate it. As a principle, Holmes found the sale void only when the illegal intent of the buyer is not only known to the seller but encouraged by the sale.<sup>136</sup> This requirement has been taken as an expression of the widespread tendency of American courts to restrict the extraterritorial effect of statutes concerning intoxicating liquor, which were considered a disturbing element in commerce. But similar arguments were used abroad to validate contracts during the American era of prohibition. When a dock was leased in the Detroit River on the Windsor side for storing liquor, the Ontario court upheld the contract. One judge noted the absence of proof that by the lease the parties intended to commit a breach of the laws of the United States, a surmise not being sufficient, because the judge could not take judicial notice of the "alleged rum-running conditions in Windsor." Another left the question open whether a conspiracy to infringe the American laws by importing liquor was existent, since whatever the plaintiff did in Canada, was legal and valid.<sup>137</sup> Also the French Court of Cassation declared valid a contract of maritime insurance covering spirits, although the insurer admittedly knew very well that the

<sup>136</sup> *Graves v. Johnson* (1892) 156 Mass. 211, 30 N. E. 818. Most cases concerning liquor sales are merely applying the law of the forum.

<sup>137</sup> *Westgate v. Harris* (Ont. S. Ct., App. Div.) [1929] 4 D. L. R. 643.



purpose of the voyage was to bring the vessel near American territorial waters for transshipment. On this occasion, the Court did not formally reiterate the century-old thesis of the permissibility of clandestine smuggling, but thought that it was licit to vend alcohol on the high seas and that the sellers could not be sure of the intentions of the buyers.<sup>138</sup> Maritime insurance in such cases is the more reprehensible, as it eliminates risk incurred by dishonest adventures.<sup>139</sup> But strangely, opinions are divided on this point.<sup>140</sup>

*Generalizations.* Present American writers have adopted the view now prevailing and seem willing to generalize it to the effect that a contract should not be enforced, if it is made with a view of violating the laws of another country or at least of a sister state.<sup>141</sup> The English dicta mentioned before have the same tendency. They are in harmony with an old case which rejected a contract that aimed at supporting subversive activities.<sup>142</sup>

A similar decision of the Tribunal de la Seine invalidating a loan governed by French law by which a revolution in Venezuela would have been supported,<sup>143</sup> inspired Niboyet to enlarge the doctrine disapproving of smuggling con-

<sup>138</sup> Cass. (req.) (March 28, 1928) S. 1928.1.305. NIBOYET's note *ibid.* and in Gaz. Pal. 1928.1.812 points to the court's denial of an international public policy, whereas BATIFFOL 361 § 420 is somewhat encouraged by the hesitance of the Court.

<sup>139</sup> See NIBOYET, *supra* n. 138.

<sup>140</sup> United States: Cases for validity are cited by WILLISTON, 6 Contracts 4953, 4954 n. 7.

In Germany, the OLG. Hamburg (Oct. 21, 1927) Hans. RGZ. 1928 B No. 2, IPRspr. 1928 No. 19, validated maritime insurance for smuggling. *Contra*: LG. Berlin III (Nov. 2, 1928) IPRspr. 1929 No. 13 (American Prohibition); NUSSBAUM, D. IPR. 246.

The Netherlands: Condemning the insurance company, H. R. (Jan. 10, 1924) 8 Revue Dor 299.

<sup>141</sup> See WILLISTON, 6 Contracts 4950 § 1749.

<sup>142</sup> Jones v. Garcia del Rio (1823) T. & R. 297.

<sup>143</sup> Trib. civ. Seine (July 2, 1932) Flörsheim v. Delgado-Chalbaud, S. 1934.2.73 at 75, Clunet 1933, 73; Revue Crit. 1934, 770; recommended for imitation, Note, 8 Tul. L. Rev. (1930) 283.

tracts.<sup>144</sup> He calls for a true "*ordre public international*," determinative of conflicts law in all countries, instead of for individual states. There has never been doubt about the desirability of mutual respect for legislation. But the slowness of development in this field has evident reasons. Probably, we have to be satisfied in the near future with a prudent expansion of the idea that violation of foreign law may be immoral.

*International treaties.* The normal way of securing international assistance for the purposes of a state is, of course, the conclusion of treaties. For example, the United States made eleven treaties to improve its opportunities for inspecting and arresting vessels suspected of carrying alcohol.<sup>145</sup> Also a few multipartite conventions for the suppression of smuggling have been signed.<sup>146</sup>

This suggests a final consideration. We have discussed the Brussels Convention sanctioning the Hague Rules and the satisfactory middle course achieved in dealing with liability of shipowners. Certain concessions have been suggested, recognizing prohibitions imposed by nonparticipant states on the inclusion of exemption clauses in bills of lading.<sup>147</sup> It should be expected that also, vice versa, states remaining aloof from the multipartite treaty, nevertheless respect the Hague Rules as adopted in the port of dispatch. If they do not apply the law of this port as the law of the contract in

<sup>144</sup> Note by NIBOYET, S. 1934.2.73-75; *Revue Crit.* 1934, 772.

<sup>145</sup> MESSINESI, *supra* n. 121, 60-64; DICKINSON, *Revue Dr. Int.* (Bruxelles 1926) 371.

<sup>146</sup> Conventions for the suppression of contraband traffic in alcoholic liquor: of Brussels (July 2, 1890, art. 92, implemented June 8, 1899) 82 *British and Foreign State Papers* 55 at 76 and 91 *id.* 6; of St. Germain on the liquor traffic in Africa (Sept. 10, 1919) also ratified by the United States, 8 L. of N. Treaty Series 12, HUDSON, 1 *Int. Legislation* 352 No. 8; of Helsingfors (August 19, 1925) 42 L. of N. Treaty Series 73, and 45 *id.* 183, HUDSON, 3 *Int. Legislation* 1673 No. 144 and 7 *id.* 752 No. 484.

Pan-American Convention on the Repression of Smuggling, Buenos Aires (June 19, 1935) HUDSON, 7 *Int. Legislation* 100 No. 415.

<sup>147</sup> *Supra* Chapter 29, p. 426 and n. 139.

general, still they ought to recognize the true international public policy embodied in a treaty of such merits.<sup>148</sup>

<sup>148</sup> Correct international contract practice is illustrated by a bill of lading written in English for shipments from Antwerp whereby the jurisdiction of the courts of Hamburg is exclusively competent but the lawsuits are "to be delivered according to article 91" of the Belgian Maritime Code (Hague Rules). The Commercial Tribunal of Antwerp (Nov. 16, 1939) *Jur. Port d'Anvers* 1940, 225 has accepted this clause as valid, since the foreign court must be presumed to respect the Belgian public policy embodied in art. 91 *cit.*

## TABLES

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